INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

VOLUME VII

Counter-Memorial of Malaysia;
Reply of Indonesia

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

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This case, entered on the Court's General List on 2 November 1998 under number 102, was the subject of Judgments delivered on 23 October 2001 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575) and 17 December 2002 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625).

The documents relating to the case are being published in the following order:

Volume I. Special Agreement; Memorial of Indonesia.
Volume II. Memorial of Indonesia *(continuation)*.
Volume III. Memorial of Indonesia (Affidavits and Maps).
Volume IV. Memorial of Malaysia.
Volume V. Memorial of Malaysia (Maps).
Volume VI. Counter-Memorial of Indonesia.
Volume VII. Counter-Memorial of Malaysia; Reply of Indonesia.
Volume VIII. Reply of Malaysia; Application for Permission to Intervene by the Philippines; Written Observations of Indonesia and Malaysia; Verbatim Records of the Hearings.
Volume IX. Verbatim Records of the Hearings *(continuation)*.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2010.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 102 le 2 novembre 1998, a fait l'objet d'arrêts rendus le 23 octobre 2001 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), requête à fin d'intervention, arrêt, C.I.J. Recueil 2001*, p. 575) et le 17 décembre 2002 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 625).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

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Volume II. Mémoire de l'Indonésie *(suite)*.
Volume III. Mémoire de l'Indonésie (déclarations sous serment et cartes).
Volume IV. Mémoire de la Malaisie.
Volume V. Mémoire de la Malaisie (cartes).
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Volume VII. Contre-mémoire de la Malaisie; réplique de l'Indonésie.
Volume VIII. Réplique de la Malaisie; requête à fin d'intervention des Philippines; observations écrites de l'Indonésie et de la Malaisie; comptes rendus d'audience.
Volume IX. Comptes rendus d'audience *(suite)*.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement*; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

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Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios: outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2010.

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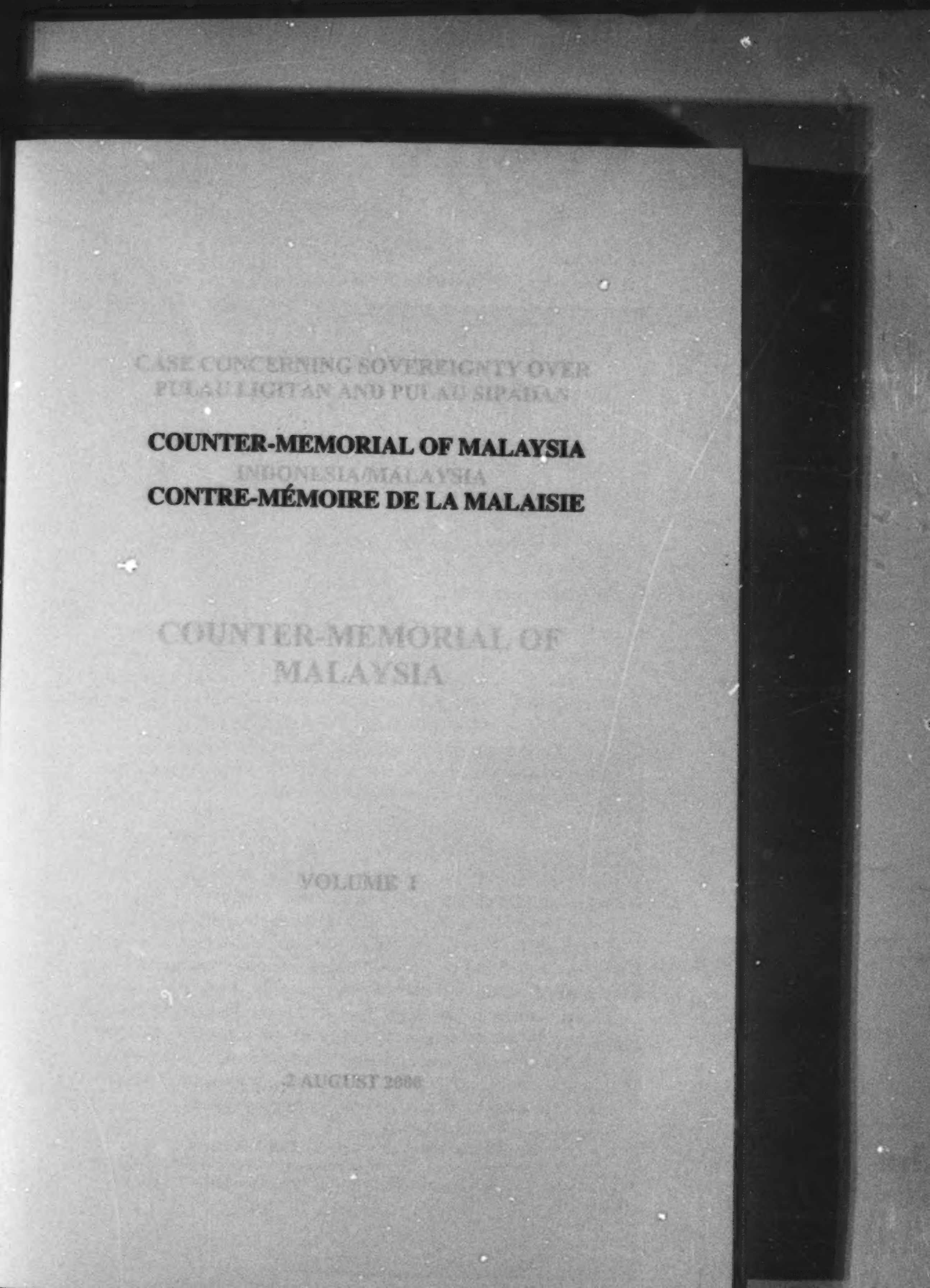
CONTRE-MÉMOIRE DE LA MALAISIE



CASE CONCERNING SOVEREIGNTY OVER
PULAU LIGITAN AND PULAU SIPADAN

INDONESIA/MALAYSIA

COUNTER-MEMORIAL OF
MALAYSIA

VOLUME 1

2 AUGUST 2000

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

INDONESIA/MALAYSIA

COUNTER-MEMORIAL OF MALAYSIA

VOLUME 1

2 AUGUST 2000

Chapter 1

INTRODUCTION

1.1. This is the Counter-Memorial of Malaysia in the present proceedings, filed pursuant to the Order of the President made on 11 May 2000. It responds to the Memorial of the Republic of Indonesia of 2 November 1999.

The geographical setting

1.2. Before turning to summarise the cases of the two parties as presented in their respective memorials, it is useful to recall the geographical setting of the dispute. **Insert 1**, opposite, shows that setting, with key place names as they were (or were thought to be) at about the time of the 1891 Anglo-Dutch Boundary Convention, on which the Indonesian case hangs.[1] The case concerns two small islands off the coast of North Borneo, part of a group of small islands and reefs surrounding the Semporna Peninsula.

1.3. It is useful to review the European understanding of the geography of the two islands at the time of the 1891 Boundary Convention. Useful for this purpose are the contemporary sailing directories or pilots, to which mariners and other Europeans concerned with the region would have referred. Annex 1 to this Counter-Memorial extracts the relevant pages from the directory entitled *Eastern Archipelago, Part I (Eastern Part)*, published in London for the Hydrographic Office of the Admiralty in 1890.[2] Under the general rubric of "Darvel Bay", it deals with a series of locations (settlements, islands, reefs, etc.) running from north to south. The entry for the Ligitan islands reads as follows:

---

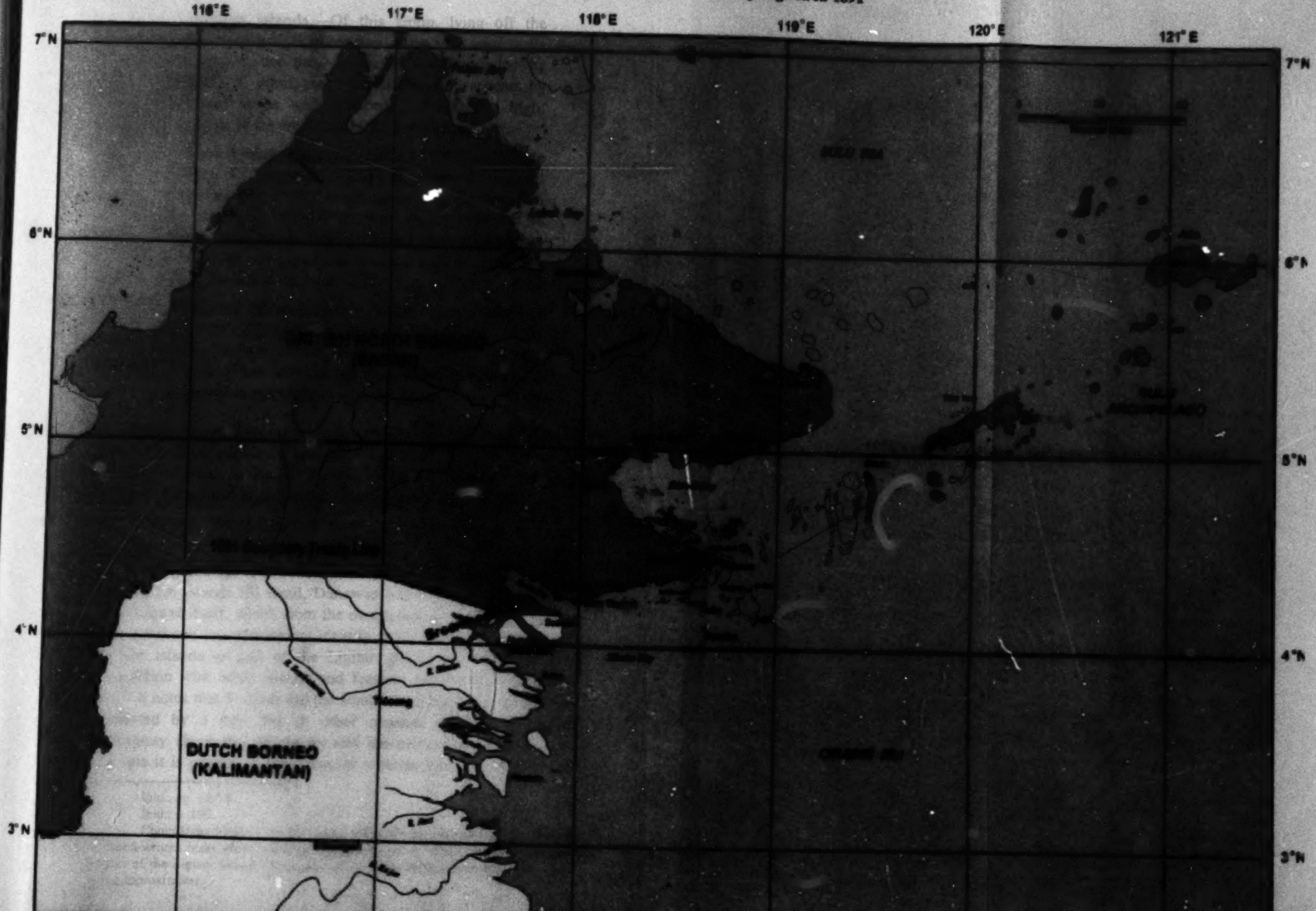
[1] For the 1891 Boundary Convention see Annex MM 17, vol. 2.

[2] J.P. Maclear (comp.), *Eastern Archipelago, Part I (Eastern Part)* (London, Hydrographic Office, Admiralty, 1890) pp. 182-191; Annex MCM 1, vol. 2.

118°E
121°E
7°N
6°N
5°N
4°N
3°N
SULU
ARCHIPELAGO
DUTCH BORNE
(KALIMANTAN
118°E

Insert 1

North Borneo Coast and Sulu Archipelago *circa* 1891


116° E
117° E
118° E
119° E
120° E
121° E
7° N
6° N
5° N
4° N
3° N
SULU SEA
SULU ARCHIPELAGO
DUTCH BORNEO
(KALIMANTAN)

> "**Ligitan islands**.—Of this group, lying off the north coast of Sibuko bay there is very little information, but they appear to be surrounded by dangers. Si Amil, the north-easternmost, appears by the chart to be wedge-shaped, and 800 feet high; Danawan, to the westward of it, appears to be low.
>
> **A small islet** with a few shrubs on it lies in latitude 4° 12½' N., longitude 118° 54' E. From it, Si Amil island bears N. 5° W. Reefs extend 4 or 5 miles from this islet in an easterly direction, and it appears to be connected by a reef to Si Amil; this reef is dangerous, as there are no symptoms except breakers about one mile eastward of the islet.
>
> **Sipadan**, the southernmost of the group, is 120 feet high. Coming from the eastward Sipadan should be kept to the northward of west, as the extent of the reefs to the eastward of it has not been determined; they do not appear to the southward of the island."[3]

The directory then goes on to deal with Sibuko or St. Lucia Bay. It refers *inter alia* to Batu Tinagat point, and notes "the entrance of the little river Tawao, on the left bank of which the Dutch have a small settlement",[4] as well as to Sebatik island and the Sibuko river.

1.4. The passage is of considerable interest. It names three of the four Ligitan islands (Si Amil, Danawan and Sipadan), but does not name Ligitan itself, which from the description given and its bearing to Si Amil one can nonetheless identify as the "small islet". It treats all four islands as part of the Ligitan group, and treats them in conjunction with other islands and features associated with Darvel Bay.[5] It notes that Si Amil and the small islet (Ligitan) are physically connected by a reef, but in other respects shows considerable uncertainty about the geography and the navigational hazards: for example it is unclear to the compiler whether there are reefs to the eastwards of Sipadan (in fact there are not, since Sipadan is an oceanic pillar). Of particular note for present purposes is that it locates Ligitan in the wrong longitude, though in approximately the correct latitude. The position is as follows:

---

[3] Ibid., pp. 187-8.

[4] Ibid., p. 190.

[5] Commander Field of the *Egeria* drew heavily on these sailing directions in his hand-written notes which are at Annex IM 90, vol. 3. Again Sipadan is treated as part of the Ligitan Group and Ligitan itself is not named: its position is only given approximately.

Coordinates of Ligitan

1890 Directory		Actual	
Lat:	4° 12½' N.	lat:	4° 09' 48" N.
Long:	118° 54' E.	long:	118° 53' 04" E.

The coordinates of Sipadan are not given. The directory also notes (as if by way of exception) the existence of a small Dutch settlement on the left bank of the Tawao River at its entrance, and the availability of information about Sebatik from Dutch charts. Otherwise all references are to British vessels, settlements and surveys.

The basis of the Indonesian case

1.5. As developed in its Memorial, the Indonesian case does not differ from that disclosed in earlier negotiations, going back to 1969 when the Indonesian claim to the islands was first made. In its essentials, Indonesia argues that:

(a) The islands were part of the dominions of the sultanate of Bulungan under Dutch protection and sovereignty;

(b) There was a dispute concerning the islands between the Netherlands and Britain (on behalf of North Borneo) before 1891;

(c) The dispute was resolved in favour of the Netherlands by the 1891 Boundary Convention, because the Convention can be seen (with the crucial aid of an internal Dutch map) to have drawn not only a boundary but an allocation line, running eastwards along the parallel of 4° 10' N, placing the islands under Dutch sovereignty;

(d) The Netherlands and subsequently Indonesia retained the sovereignty attributed to them in 1891, despite the fact that they never exercised administrative control or jurisdiction over the islands.

1.6. This argument faces severe difficulties. They include the following:

(a) There is no evidence whatever that the claims of the Sultan of Bulungan extended to the islands or that he exercised the slightest authority there; all the evidence is to the contrary;

(b) All descriptions of the boundary dispute before 1891, whether given by Dutch or British officials, make it clear that the dispute concerned exclusively the area to the west and south of Batu Tinagat, and had nothing to do with islands further to the east;

(c) The 1891 Boundary Convention cannot bear the interpretation Indonesia prefers, which is also flatly contradicted by the Anglo-Dutch Agreement of 1915 and the attached, agreed map;

(d) The internal Dutch map, even if it did support that view (and it is equivocal), is inadmissible as evidence of the intention of the parties, and even if it was admissible, it could not prevail over the express terms of the Convention;

(e) The Netherlands cannot have gained in 1891 sovereignty over islands which then belonged to a third State (Spain) and which were subsequently ceded to Great Britain without any protest whatever by the Netherlands, or any action to sustain the claim now made.

The bas[illegible] of the Malaysian case

1.7. By contrast, Malaysia's case is clear and unshaken by anything argued or disclosed in Indonesia's Memorial. It may be summarised as follows:

(a) The two islands were part of the dominions of Sulu before 1878, at the time the Sultan of Sulu granted to the promoters of the British North Borneo Company the right to administer North Borneo and certain inshore islands;

(b) There is a clear and unbroken chain of administration of the islands by North Borneo, which began following the grant of 1878;

(c) After the United States acquired Spain's rights in the region in 1900, the United States specifically claimed sovereignty over the two islands, a claim which Britain expressly recognised;

(d) In turn, by Exchange of Notes of 1907 the United States allowed North Borneo to continue to administer the islands; then in 1930 the islands were ceded to North Borneo by a Treaty between Britain and the United States;

(e) The islands have been continuously administered by Malaysia and its predecessors in title ever since.

The task of the Court

1.8. Evidently, the task of the Court faced with these conflicting arguments is to reach its own conclusion, as provided for in Article 2 of the Special Agreement concluded between Indonesia and Malaysia on 31 May 1997.[6] In a case brought by Special Agreement neither party bears any formal onus of proof. Nonetheless, in the particular circumstances of the present dispute, Indonesia most certainly does have a substantial onus, since it is asking the Court:

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[6] Annex MM 33, vol. 2.

(a) to disturb the well-attested, uninterrupted possession and administration of the islands by Malaysia and its predecessors in title, dating back more than a century;

(b) to do so on the basis of a unilateral interpretation of a Convention of 1891 which has no textual foundation in the Convention or in its *travaux* and is supported, if at all, only by an internal map never officially communicated to the other party and not opposable to it;

(c) to do so on the basis of an interpretation which the Netherlands itself never placed on the Convention, and in support of a claim which the Netherlands never made;

(d) to do so on the basis of an interpretation which is contradicted by the subsequent practice of the parties to the Convention, as well as of the parties to this case;

(e) and to do all this in circumstances where, even if the parties had wanted to, they could not have affected sovereignty over the islands at the time of the 1891 Convention, because they then belonged to a third State, Spain.

The material presented by Indonesia does nothing to discharge that onus. On the contrary, it confirms Malaysia's sovereignty over the two islands. That sovereignty was acquired by a clear and well attested chain of transactions, and in particular by the Boundary Convention between Britain and the United States of 1930, at which time sovereignty and administration of the islands were reunited in the State of North Borneo under British protection. But if there were any doubt about this, the fact of the undisturbed administration of the islands by Malaysia and its predecessors in title for more than a century must be decisive.

The structure of this Counter-Memorial

1.9. Since Indonesia's case depends on the 1891 Boundary Convention, in this Counter-Memorial Malaysia will first show that none of the Indonesian arguments as to the effect of that Convention has any weight (Chapter 2). It will then, so far as necessary in response to Indonesia's Memorial, deal with the transactions which *did* concern the two islands and which *did* involve administration over them, in particular, the transactions between the United States and Britain in right of North Borneo in 1907 and 1930 (Chapter 3). The conduct of Indonesia and Malaysia and their predecessors in title in relation to the islands will then be surveyed, and the Indonesian account of that practice refuted. It will be shown that it clearly supports Malaysia's title to the islands (Chapter 4). Finally the map evidence adduced by Indonesia will be discussed, and a number of further Dutch and Indonesian maps reviewed. Taken together, the map evidence provides useful supplementary support for Malaysia's sovereignty over the two islands. In particular there is not a single map which in terms attributes them to Indonesia (Chapter 5).

1.10. Appended to Volume 1 is a report by an authority on Dutch colonial history, Professor Houben, showing that the present Indonesian claim via the Sultanate of Bulungan is lacking any historical foundation.[7] Volume 2 contains certain additional documents and maps referred to in this Counter-Memorial.

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[7] See below, Appendix 1.

Chapter 2

THE 1891 BOUNDARY CONVENTION DID NOT AFFECT THE DISPUTED ISLANDS

A. The Territorial Title Alleged by Indonesia

2.1. Indonesia's claim to the islands of Ligitan and Sipadan rests exclusively on the Boundary Convention of 20 June 1891 between Great Britain and the Netherlands. As the Indonesian Memorial says:

> "While for the reasons explained in Chapter IV there were various uncertainties as to the exact location of the boundary between Dutch and British possessions in North Borneo, those uncertainties were brought to an end by the conclusion of the Convention between Great Britain and The Netherlands Defining Boundaries in Borneo of 20 June 1891. The terms of that Convention, and its contemporaneous interpretation by the Parties, leave no doubt as to the inclusion of both Ligitan and Sipadan within the colonial domains of The Netherlands."[1]

2.2. Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930.[2]

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[1] IM, para. 5.1., p. 61.

[2] See MM, ch. 5 & Chapter 3 below.

2.3. Given the importance of the 1891 Boundary Convention for the Indonesian case, this Chapter will examine closely the argument put forward in the Indonesian Memorial. Unfortunately for Indonesia, neither the terms of the Boundary Convention, nor its contemporaneous interpretation by the Parties to the Convention, support its conclusion.

B. Background to the Boundary Convention of 20 June 1891

2.4. The authority of the Sultan of Sulu on the coastal territory of northeast Borneo in the middle of the 19th century is not in dispute between the Parties to the present proceedings. The effective authority of the Sultan of Bulungan over the territory claimed by the Netherlands in 1891 is much more questionable, contrary to the assertions of the Indonesian Memorial.[3] The dependencies of the Sultan of Sulu at the time of the 1878 concession overlapped in the south with the Dutch claims to the Sultanate of Bulungan, but that overlap never extended to the islands now claimed by Indonesia, as the following account will show.

2.5. The grant by the Sultan of Sulu to Messrs. Overbeck and Dent of 22 January 1878 was in the following terms:

> "...all the rights and powers belonging to us over all the territories and lands which are tributary to us on the mainland of the island of Borneo from the Pandasan river on the west extending along all the lands on the east coast as far as the Sibuku river in the south and including all the territories on the coast of the Pandasan river and the coast lands of Paitan, Sugut, Bonggaya, Labuk, Sandakan, Kinabatangan, Mumiang and all the other territories and coast lands to the southward thereof on the coast of Darvel Bay as far as

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[3] IM, paras. 4.55 ff.

> the Sibuku River together with all the islands included therein within nine miles of the coast."[4]

2.6. On 28 February 1846, the Governor-General of the Netherlands East Indies issued a resolution fixing the northern limit of the Dutch administrative divisions at the 3° 20' north latitude, or at the river Atas. The resolution declared:

> "The parts of Borneo on which Netherlands does not exercise any influence are:
>
> (a) The States of the Sultan of Bruni or Borneo proper, extending from Tanjong Datu on the west to the River Kemanis on the east, situated on the north-west coast.
>
> (b) The State of the Sultan of the Sulu Islands, having for boundaries on the west the River Kemanis, the north and north-east coasts as far as 3° north latitude, where it is bounded by the River Atas forming the extreme frontier towards the north with the State of Berou dependant on the Netherlands.
>
> (c) All the islands of the northern coasts of Borneo."[5]

The description is precise, given the geographical knowledge of the area at the time.[6] The mouth of the Atas river was thought to be located at 3° 20' N.[7]

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[4] Annex MM 9, vol.2. The first reference to the limit of this kind seems to be in the Treaty of Friendship and Commerce of 27 May 1847 between Britain and the Sultan of Borneo, Annex IM 11, vol. 2. Article X, which refers to a 10 geographical mile limit.

[5] Annex IM 10, vol. 2.

[6] See above, paragraphs 1.2-1.3.

[7] It is shown in that location by Indonesia in its sketch map at IM, opposite page 66. On modern maps no such river is shown, but rather a series of bays and indentations. Some maps show a river by the name of Antjam at about that location: whether it is the River Atas of the documentary record is unclear.

2.7. On 27 August 1849, the resolution was modified by decree. The new text dropped the reference to the 3° 20' N parallel. It did not give any precision as to the location of the northern boundary.[8]

2.8. The Contract between the Sultan of Bulungan and the Government of the Netherlands East Indies of 12 November 1850 provided in article 2:

> "The territory of Boeloengan is located within the following boundaries:
>
> ...with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.
>
> The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto."[9]

2.9. But, contrary to the stipulations of the Treaty of 1824, the Contract was never notified to the British Government, as the Dutch Minister of Foreign Affairs admitted in the Second Chamber of the States-General on 8 March 1892.[10] There would have been no reason for the British Government to protest in 1850, as it had no way of knowing about the Contract. The first notification of the Dutch claim was on 17 January 1880, after the 1878 Sulu concession: only when the Contract with the Sultan of Bulungan was renewed in 1878 was it communicated to the British authorities.[11]

2.10. Reference to "the small islands belonging thereto" in the Contracts of 1850 and 1878 obviously concerned the islets immediately adjacent to the large islands mentioned there. Contrary to the assertion of the Indonesian Memorial implying that the Parties to the 1891 Boundary Convention had in mind "all territorial issues between them, including those concerning the neighbouring islands",[12] the British and Dutch authorities at no time gave the slightest indication that islands so far out at sea as Sipadan and Ligitan were concerned by that boundary delimitation. Whenever the Dutch authorities refer to islands, it is in the proximate sense. For instance, Count de Bylandt affirms, in a letter dated 8 April 1881, that the sovereignty of the Netherlands extends to:

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[8] Annex IM 12, vol. 2.

[9] Annex IM 13, vol. 2.

[10] Annex IM 84, vol. 3.

[11] IM, para. 3.22., p. 15.

> "2. Les Iles Terrakan, Manoekan, et Sibittikh avec les îlots *adjacents*."[13]

On 19 June 1893 the description of the territory of Bulungan in the 1878 Contract was amended to adapt the Contract to the 1891 Treaty. The new description was in the following terms:

> "The Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik situated to the south of the above boundary-line, described in the "Indisch Staatsblad" of 1892, No. 114, belong to Boeloengan, as well as the small islands *belonging to the above islands*, so far as they are situated to the south of the boundary-line last mentioned."[14]

2.11. The small islands referred to were "adjacent" or "belonging to" the larger islands of Tarakan, Nanoekan or Sebatik. They could in no way designate Sipadan or Ligitan, which were certainly not adjacent to or belonging to the larger islands mentioned. Sipadan is 42 nautical miles east of the island of Sebatik. Ligitan is some 15 nautical miles still further east.

2.12. The overlapping claims in the south were bound to create conflict. To assert their perceived rights, the Netherlands hoisted the flag in 1879 at Batu Tinagat and occupied the nearby village of

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[12] IM, para. 4.72., p. 60.

[13] Annex MM 41, vol. 3 (emphasis added).

[14] Annex MM 54, vol. 3 (emphasis added).

Tawau, whilst Dutch warships occasionally patrolled the north-east coast.

2.13. The cape of Batu Tinagat, on the northern coast of Sibuko or St. Lucia Bay, was the extreme eastern claim of the Netherlands on the east coast of Borneo and was consistently described as such. As early as 1 December 1882, the Dutch Minister in London, Count de Bylandt, considered that any territory east of Batu Tinagat was beyond Netherlands territory:

> "La notice que j'ai l'honneur de remettre ci-prés à votre Excellence contient un ensemble de faits qui permettent de considérer comme fort probable que la rivière désignée dans les Concessions sous le nom de "Siboeboe" est située *à l'est de Batoe Tinagat et par conséquent en dehors du territoire Néerlandais*. En ce cas toute cette controverse tomberait d'elle-même; elle n'aurait en réalité jamais existé."[15]

2.14. The note sent by Count de Bylandt to the Marquis of Salisbury on 22 December 1888 confirmed that Batu Tinagat was the most eastern point of the Dutch possessions on the Island of Borneo:

> "Le Gouvernement du Roi a cru devoir prendre comme limites extrêmes à l'ouest: Tandjong Datoe, et à l'est: Batoe Tinagat, étant donné que les droits de souveraineté des Pays-Bas sur ces deux points extrêmes de l'Ile de Bornéo ne sauraient être contestés."[16]

2.15. The Netherlands Delegates to the Joint Commission noted at the second meeting, on 19 July 1889:

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[15] Annex IM 31, vol. 2 (emphasis added).

[16] Annex IM 37, vol. 2.

> "7. Admitting that the statements of Mr. Treacher should be correct insofar as the regions are concerned to the *eastward* of Batoe Tinagat, they certainly are incorrect as to the disputed district which was not occupied by the Sulu chiefs."[17]

2.16. But, as the Minister of Foreign Affairs admitted in the ratification debate in 1892, "...the claim of the Netherlands to fix the boundary of its territory on the east coast of Borneo so far as the Tawao river and Batoe Tinagat was not in reality indisputable", adding that "...the claims of Boeloengan to Batoe Tinagat could not be proved and were in reality imaginary."[18] The hold of the Netherlands on territory north of Sibuko Bay was shaky to say the least, as the Indonesian Memorial concedes.[19] The Explanatory Memorandum submitted by the Dutch Government to the Parliament admits:

> "A local inspection carried out by the deputy assistant resident of Koetei revealed that the Bajaus who live on the islands located at the North Eastern coast of Borneo, which belong to the Sultanate of Solok, still continuously collect forest products in the disputed area and show no concern whatsoever for the Sultan van Boeloengan."[20]

It may be recalled that the Bajaus, or sea gypsies, were living in the vicinity of Sipadan and Ligitan, as they still do.[21] They were principally based on Danawan, the headmen of which had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan. They were considered as a Sulu population. No single document so far disclosed in this case states or even suggests that they were under the authority of Bulungan and the Netherlands.

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[17] Annex MM 45, vol. 3 (emphasis in original).
[18] Annex IM 84, vol. 3.
[19] IM, para. 5.23., p. 73.
[20] Annex MM 51, vol. 3.
[21] MM, pp. 12-19.

2.17. The history of the negotiations prior to the 1891 Treaty confirms the views of the deputy assistant resident of Koetei. He reported that the Sultan of Bulungan...

> "was prepared to act unconditionally according to the arrangements to be made by the Dutch and English Governments, but would rather see that to the population of Boeloengan for the term of 15 years be given the right to collect forest products free of tax in the area between Broershoek and Batoe Tinagat."[22]

2.18. That was so decided in the Treaty, Article VI. The interesting point is that the Sultan of Bulungan at no time asked for the right to collect products of the sea on islands east of Batu Tinagat, which would have been turned over to British North Borneo. Valuable commodities could be collected on the islands, in particular turtle eggs. If the Sultan of Bulungan had considered the islands east of Batu Tinagat as within his possessions, he would no doubt have claimed the same rights for his people.

2.19. In 1888, Great Britain entered into agreements establishing protectorates over Sarawak, Brunei and the territory of the British North Borneo Company. The Dutch Foreign Minister was "somewhat taken aback" by the news. But the Dutch Government did seize the opportunity to propose an agreement on the boundaries of Borneo. As the Explanatory Memorandum submitted to the Dutch Parliament puts it, "the border dispute had become automatically a matter for negotiation between the Dutch and British Governments."[23] In 1889, the Foreign Secretary, Lord Salisbury, agreed to refer the question for consideration and advice to a small committee of representatives of the two States. Great Britain appointed Sir Philip Currie, Permanent Under-Secretary of State for Foreign Affairs and Sir Edward Hertslet. The Netherlands appointed the Count de Bylandt, Dutch Minister in London and Mr.

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[22] Explanatory Memorandum, Annex MM 51, vol. 3.

[23] Ibid.

A.H. Gysbert, official of the Netherlands Ministry of the Colonies.[34] Negotiations could begin.

2.20. In relation to Ligitan and Sipadan, the following points may be noted on the eve of the negotiations:

(a) The boundary dispute between Great Britain and the Netherlands concentrated on the land boundary on the Island of Borneo and, in particular on the point on the east coast where the boundary would start.

(b) The "extreme" Dutch claim to the east was the cape of Batu Tinagat. All the territory east of that point was considered British or Spanish territory by the Dutch authorities themselves.

(c) The only islands in the vicinity of the north coast of Sibuko Bay mentioned in any documents, whether Contracts with the Sultan of Bulungan, administrative Dutch delimitation or diplomatic exchanges between the two Governments were the islands of Tarakan, Nunukan and Sebatik and the "small islands belonging thereto" or "adjacent" to those islands.

(d) The Sultan of Bulungan had little or no control on the area in dispute, let alone over islands well to the east. He was only too happy to secure the right for his people to collect forest products free of tax for 15 years, but never advanced the slightest claim to islands, or the product of islands, east of Batu Tinagat. On the contrary, the Bajau people, living on the coast of North Borneo, felt free to roam in the area, owing allegiance to the Sultan of Sulu.

C. The Negotiations for the 1891 Convention

2.21. The negotiations lasted for two years. The Joint Commission held three meetings, on 16, 19 and 27 July 1889. Diplomatic exchanges ironed the major issues which had been pointed out by the Joint Commission. The Boundary Convention was signed on 20 June 1891.

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[34] MM, pp. 91-94; IM, pp. 63-70.

2.22. As Sir Edward Hertslet, the second British member of the Joint Commission, had noted:

> "...it may be well to call attention to the great importance of not allowing the Dutch to enjoy the sole right of navigating the Sibuco and the numerous other rivers which flow from the interior of the Island of Borneo into the sea, in the Sibuco or Sainte-Lucia Bay, to the south of Batu Tinigat, as to admit such a claim might have the effect of depriving the Company of a large portion of their possessions, as the actual course of the Sibuco is not known, and it might be found to rise considerably to the north of Batu Tinigat, and to flow through a vast extent of territory in the interior belonging to the North Borneo Company.
>
> The question of the navigation of these rivers, then, is really the only important point in dispute..."[25]

2.23. Contrary to what is asserted by Indonesia,[26] the Dutch were not "on the retreat, yielding territory to which they had strong claims" between Broershoek and Batu Tinagat. Rather, as the Netherlands Government readily admitted in the Explanatory Memorandum submitted to the Parliament,[27] they were seeking a settlement which would give them "a quite correctly described borderline which puts an end to all difficulties in the future, not only concerning that part of Borneo which was connected with the border dispute but also concerning the whole island."[28] During the Parliamentary debate in The Hague, the Ministers insisted, in the words of Mr. Van Tienhoven, Minister of Foreign Affairs, that...

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[25] Further Memorandum, 9 January 1889, Annex MM 43, vol. 3.

[26] IM, para. 5.24, p. 74. But see IM, para. 5.23, p. 74: "The Dutch Government regarded acceptance of the 4° 10'N line as not involving the loss of any possessions which were unquestionably Dutch."

[27] Annex MM 51, vol. 3.

[28] Ibid.

> "... it cannot be said that we are now retracting and giving up territory that undoubtedly belongs to us."[29]

As the Explanatory Memorandum puts it, in the eyes of the Netherlands Government "... the boundary is much more favourable for the Dutch than the British desired."[30]

2.24. The Joint Commission did propose that the boundary start from a point about 4° 10' north on the coast, then "pass between the islands of Sebattick and East Nanoekan". This was a British proposal, advanced by Sir Philip Currie to ensure access of British ships to the estuary of the Sibuko River. It was related to the overriding concern about navigation and was in no way "clearly envisaged in principle as one which, starting on the coast, ran eastwards *at sea* for an indeterminate distance (although at least between the two named islands), i.e., out to the open sea", as Indonesia incorrectly puts it.[31] If such had been the intention of the British Government, Britain would have singled out the issue when Count de Bylandt finally rejected the proposal. In fact the ensuing negotiation was exclusively concerned with navigation and not with a boundary running out to the open sea.

2.25. The decision to adopt the parallel of 4° 10' N latitude as the starting point for the boundary, westward across the island of Borneo and eastward across the island of Sebatik, was an obvious compromise, roughly half way between the British proposal of 4° north and the location of Batu Tinagat, thought to be at about 4° 19' north.[32] The choice of the parallel continued across Sebatik island was a convenient way of ensuring equal access to the Sibuko River. Other alternatives (such as enclaving the little Dutch settlement on the Tawau River) were too complex and would have created a future "hornets nest", in Count de Bylandt's words.[33]

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[29] Annex IM 84, vol. 3.

[30] Annex MM 51, vol. 3.

[31] IM, para. 5.23., p. 73.

[32] Annex MM 40, vol. 3. Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880.

2.26. The order in which the decisions were taken gives the key to the structure of the Boundary Convention. The point is of interest, given the elaborate Indonesian demonstration as to the significance of the articles of the Convention.[34] Sir Edward Hertslet noted, on the first meeting of the Joint Commission, "...in the event of a satisfactory understanding being arrived at with regard to the disputed boundary... on the north-east coast, in the neighbourhood of the Sibuco River, the British and Netherland Governments will proceed without delay to define, short of making an actual survey, and marking the boundary on the spot, the inland boundary-lines..."[35] The *first step* was to determine the starting point on the east coast of mainland Borneo. As Sir Philip Currie remarked, "...until the boundary on the coast was settled, the question of the frontier inland must remain in suspense..."[36] At the third meeting, Sir Philip proposed "That the boundary-line on the coast should start from the point called Broers Hoek, in about 4° 10' north latitude..."[37] The Joint Commission agreed to the proposal. The *second step* was the determination of the boundary inland, to the west. On 2 February 1891, Count de Bylandt proposed to Lord Salisbury the adapted watershed line between the rivers Simengaris and Soedang, as finally written into the Boundary Convention.[38] The *third step* was the agreement to divide the Island of Sebatik by following the 4° 10' parallel north from the west coast to the east coast of the Island.[39] That order of negotiation is reflected in the order of the relevant articles of the Boundary Convention.

2.27. The only offshore islands that were mentioned or thought to be relevant were certain offshore islands, in the immediate vicinity of the coast of Borneo. A member of the Dutch delegation,

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[33] Annex MM 47, vol. 3.
[34] IM, para. 5.43. pp. 83-86.
[35] Annex MM 44, vol. 3.
[36] Annex MM 46, vol. 3.
[37] Annex MM 46, vol. 3.
[38] Annex MM 50, vol. 3.
[39] Ibid.

Mr. Elias, mentioned that a decree of the Governor-General of Netherlands East Indies dated 2nd February 1877 had specified that "the Islands of Sibbitich, Nanoekkan and Tarakkan" belonged to the Netherlands.[40] These islands were adjacent to the mainland coast, well within the three-mile limit. In the *Guinea/Guinea Bissau* case, in somewhat comparable circumstances, the French Government had mentioned during the ratification debate "les îles situées le long de la côte... de même que celles qui se trouveront dans les eaux des possessions françaises". The arbitral tribunal noted that "Il semble que cela n'ait visé que les îles côtières, qui étaient indubitablement situées dans les eaux territoriales."[41] The islands mentioned by Mr. Elias were in the direct vicinity of the proposed boundary lines and would necessarily be affected by the choice of the boundary. They were part and parcel of the mainland boundary dispute. No other islands were mentioned, either directly or indirectly, during the negotiations. There was no question of any line running eastwards at sea.

2.28. To sum up, in relation to the present dispute:

(a) The negotiations were dominated by the issue of access to the rivers on mainland Borneo and freedom of navigation on these rivers.

(b) The compromise proposal was a balanced one. The Netherlands Government strongly denied it was yielding any territory.

(c) The negotiators settled the starting point on the east coast first, then determined the course of the boundary westward across mainland Borneo, then the course of the boundary eastward across the Island of Sebatik.

(d) The only islands mentioned during the negotiations were Tarakan, Nunukan and, naturally, Sebatik. These islands, adjacent to the coast of Borneo were necessarily affected by the mainland boundary dispute.

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[40] Annex MM 45, vol. 3.

[41] Arbitral award, 14 February 1985, para. 61.

(c) There never was any question of a boundary-line running eastwards out to the open sea.

D. The Survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda*, 30 May – 19 June 1891

2.29. Indonesia underlines the importance of the naval survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda* in June 1891. Malaysia agrees this is a useful element for the understanding of the present case. But the slight confusion noticeable in Indonesia's presentation of the facts calls for clarification.

2.30. On 29 December 1890, Lord Salisbury requested the British Minister in The Hague, Sir Horace Rumbold, to ask the Netherlands Government:

> "...whether, if Her Majesty's ship 'Egeria' should proceed on a surveying cruise to the east coast of Borneo early next year, they would consent to an investigation being made by the officers of that vessel, with a view to ascertain the exact point where 4° 10' north latitude reaches the sea, on the clear understanding that any mark which the British naval officers may think it necessary to place is without prejudice to the conflicting claims of the Netherlands East India Government and the British North Borneo Company with regard to the boundary of their respective territories on the east coast of Borneo."[42]

2.31. On 20 January 1891, the Dutch Foreign Minister, Mr. Hartsen, accepted the request. He added:

> "Eu égard, cependant, à la possibilité que ce point (le point sur la côte où se trouve le parallèle 4° 10' latitude sud [*sic*] soit adopté par la suite comme point de départ

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[42] Annex IM 63, vol. 3.

> de la limite entre les possessions Néerlandaises et Anglaises sur l'Ile de Bornéo, le Gouvernement des Pays-Bas est d'avis qu'il serait désirable que l'étude dont il est question se fasse conjointement avec des officiers d'un navire de la marine Néerlandaise."[43]

Hartsen proposed a combined expedition and suggested that the purpose of the mission be extended to explore and determine the course of the rivers Simengaris and Soedang, in the vicinity of Broershoek[44].

2.32. In the meantime, the two governments agreed that the 4° 10' north parallel be considered as the boundary on the Island of Sebatik. The Dutch Minister proposed on 7 April 1891 to instruct the combined expedition to fix the exact points at which the parallel crosses the coasts of the island and to draw up the necessary maps. But there was no question of extending the scope of the combined expedition to any other islands.[45]

2.33. The report of the Dutch surveying vessel *Banda* is precise.[46] The *Banda* arrived in St. Lucia Bay at 10 o'clock in the morning on 1st June 1891. Buoys were put in their places on the coast, just north of Broershoek and on Sebatik Island. The rivers were explored as instructed. The *Banda* left on 21 June at 8:30 o'clock for the return voyage. The combined expedition was concluded. There was never any question of the *Banda* demarcating a maritime boundary further east, let alone visiting Ligitan or Sipadan.

2.34. As the Indonesian Memorial correctly points out, "a map, entitled *Plan shewing the Result of the Determination of Parallel of 4° 10' N on the East Coast of Borneo, and Examination of the Rivers in the Vicinity*, June 1891 appears to be the 'tracing' referred to in the Admiralty letter of 24 September 1891 as illustrating the combined work of the two British vessels."[47] The map is produced as Map No. 6 in the Indonesian Atlas and as Map No. 12 in the Malaysian Atlas: for the purposes of illustration it appears again in photo-reduced form opposite, as **Insert 2**. Indonesia argues that, because the 4° 10' N parallel is continued out to sea beyond the Island of Sebatik, "it is therefore to be noted that one of the results on which both Governments had expressed their agreement was this tracing showing the relevant parallel extending out to sea."[48] If the point is to show that parallels run through land and sea alike, it is quite evident. The more important point, however, is that the parallel is considered on the map as a topographical feature and certainly not as a boundary, extended in the same manner westward towards inland Borneo and eastward out to sea. The beacons erected on Sebatik Island are correctly located, but the boundary was not yet decided at the time of the survey. And even more important, the map stops 12 miles off Sebatik. Any further maritime survey was beyond the province of the joint expedition.

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[43] Annex IM 65, vol. 3.
[44] Ibid.
[45] Annex IM 69, vol. 3.
[46] Annex IM 80, Inclosure No. 3, vol. 3.

2.35. The joint expedition ended on 21 June 1891. But that is not the end of the story. The *Egeria* did visit Sipadan Island, but in May.[49] It had arrived in March in the area and was instructed to survey the coast and islands around Darvel Bay. No notice was given to the Netherlands Government, no authorisation was called for, no combined expedition was organised, as this was undoubtedly British territory.[50]

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[47] IM, para. 5.38, p. 80.

[48] Ibid.

[49] Annex IM 89, vol. 3.

[50] As the account of the Darvel Bay survey in the *British North Borneo Herald* put it:

> "The survey of the South coast of Darvel Bay extending from Silam in the North-west to Richard's Reef... thence by the Eastern side of Pulo Gaya on to Si Amil Island and stretching to the westward as far as Egeria shoal including Sipadan Island was completed on 15th August..."

Annex IM 89, vol. 3.

Insert 2

Plan Showing the Result of the Determination of Parallel of 4° 10' N on East Coast Borneo and Examination of Rivers in Vicinity, June 1891

2.36. According to the Indonesian Memorial:

> "These references (in the report of the *British North Borneo Herald)* to Ligitan and Sipadan, an account of survey conducted by British vessels in association with a Dutch vessel at the time of the conclusion of the 1891 Convention, show that those islands were very much in mind at the time, were hydrographically significant, and were in waters which it was important to survey properly in the general interests of navigation."[51]

It appears that, due to the "almost totally unsurveyed condition of this portion of the territory under the rule of British North Borneo Government", several vessels were grounded in the reef-bestrewn waters.[52] HMS *Egeria* was accordingly ordered to undertake the survey and arrived at Sandakan on 14 March 1891. The *Egeria* stayed in the area till 27 August, then returned to resume the survey of Darvel and St. Lucia Bays from 28 March to 29 August 1892.

2.37. The *Egeria* did survey Sipadan and Ligitan. Stations were installed, in particular on Mabul and Sipadan. But all this took place in the beginning of May and was a strictly British operation. Contrary to what is implied by the Indonesian Memorial, the Dutch vessel was in no way associated with the survey of the islands off the coast of British North Borneo

2.38. The Indonesian Memorial notes that "...the Dutch were directly engaged in maritime activities in the area and were unwilling to let British naval vessels carry out such activities on their own."[53] This is probably true as to the survey of territory claimed by the Dutch and of the proposed boundary with British North Borneo. It is not true for the territory and islands to the east, which were administered by British North Borneo, including Ligitan and Sipadan.

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[51] IM, para. 5.39. P. 81

[52] *British North Borneo Herald*, Annex IM 89, vol. 3.

[53] IM, para. 5.36, p. 80.

2.39. After having surveyed certain islands off the British North Borneo coast, including Sipadan, between 13 and 19 May, the *Egeria* met HMS *Rattler* and HNLMS *Banda* on 1 June close to Broershoek for the combined expedition, to ascertain the points and erect beacons on the 4° 10' N parallel on the east coast of mainland Borneo and the east and west coasts of Sebatik. They also explored the Simengaris River as instructed. British and Dutch officers established a cordial relationship, hunted wild pigs together. The Dutch report of the expedition noted that "the most agreeable souvenirs will remain on both sides of the time passed by them in the Bay of St. Lucia."[54] The conversation was bound to have touched upon the survey of the *Egeria* in the preceding weeks. But the Dutch officers did not consider it worth mentioning in their report, much less did they protest at what (according to Indonesia's position now) would have been a unilateral British survey of Dutch islands and waters.

2.40. The *Egeria* returned the following year to complete the survey of the islands off North Borneo. She visited Sipadan and Ligitan during her cruise.[55] They were obviously considered as part of the group of islands associated with the Ligitan reef, soundly within British territory. The *Egeria* cruised on to the island of Sebatik to check the boundary beacons placed the year before.

2.41. The visit of HMS *Egeria* to the area is instructive in a number of ways. To summarise:

(a) Great Britain and the Netherlands considered it necessary to organise a combined expedition to survey the proposed boundary before signing the 1891 Treaty.

(b) The combined expedition was instructed to ascertain the points where the 4° 10' N parallel met the east coast of the island of Borneo, the east and west coast of the island of

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[54] Annex IM 80, vol. 3.

[55] Annex IM 90, vol. 3.

Sebatik, to explore the rivers Simengaris and Soedang and to draw maps thereof. A map was drawn and communicated to the Dutch authorities. It clearly was limited to the coast and the vicinity of Sebatik Island.

(c) The *Egeria* was also instructed to survey the islands off the coast of British North Borneo, in the vicinity of Darvel Bay, among which were included Ligitan and Sipadan. This was done a few weeks before the combined expedition and was a purely British venture.

(d) The Dutch authorities had insisted on the presence of a Dutch vessel to survey the boundary on the east coast of Borneo. They could not ignore the purely British survey of Sipadan and Ligitan. They did not object to the activities of the *Egeria* in an area under British sovereignty and, quite to the contrary, congratulated the British authorities for "the good understanding with the English officers".

2.42. **Insert 3**, opposite, is a sketch map of the voyages of the *Banda* and the *Egeria* in the region in 1891 and 1892. The focus of the *Egeria*'s voyages around Darvel Bay is obvious enough. The limited focus of the *Banda*'s voyage is equally obvious. The contrast with the Indonesian vision of a "joint" operation is stark. There was a joint operation, but it was limited to Sebatik and inshore waters. So, evidently, was the 1891 Convention.

E. The Interpretation of the 1891 Boundary Convention

"The ... claims were in reality imaginary"[56]

2.43. The claims were "imaginary". Mr. Van Dedem, the Dutch Minister for Colonies, was talking about the claims of the Sultan of Bulungan to Batu Tinagat. The same can be said of Indonesia's

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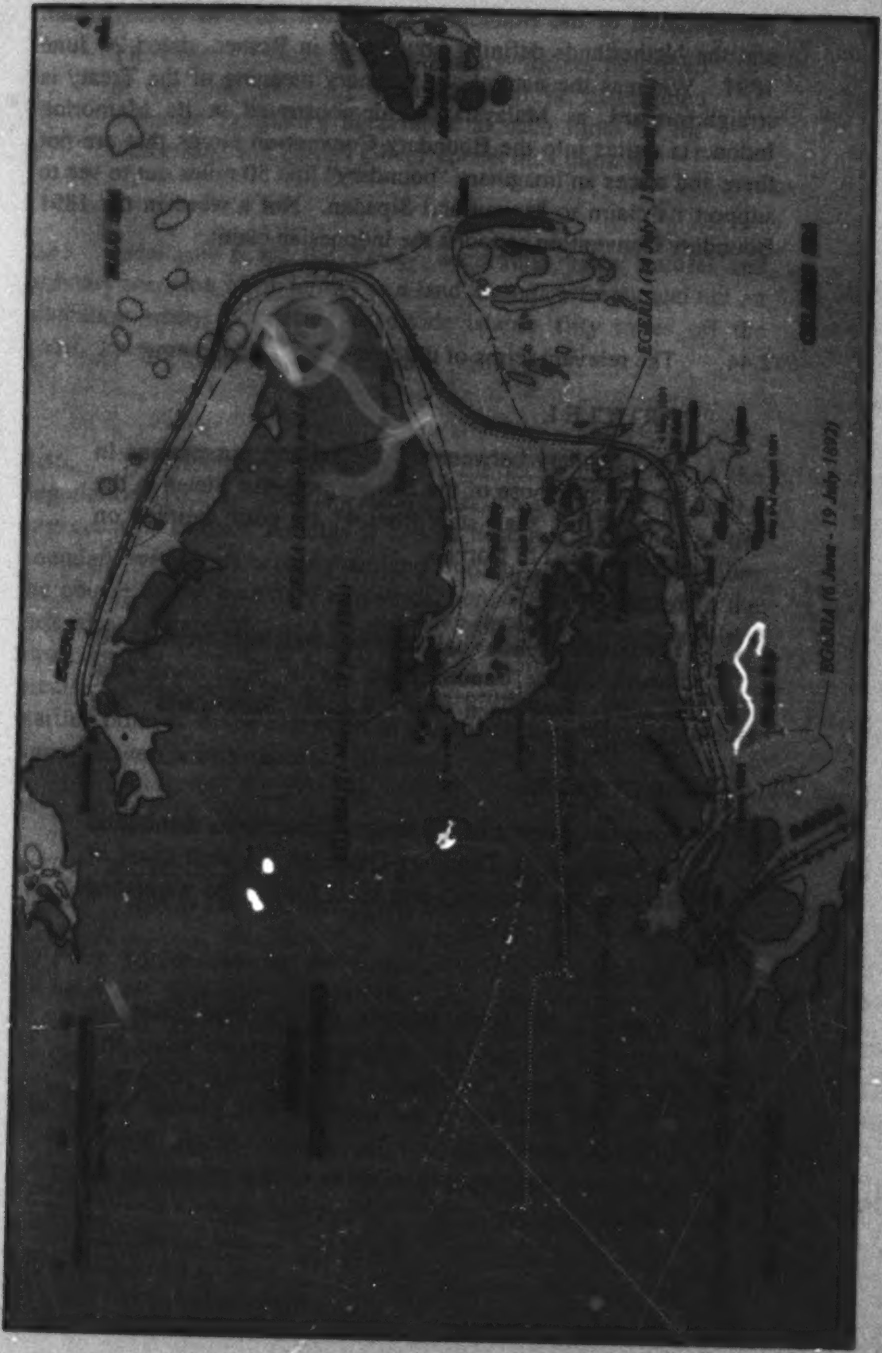
[56] Mr. Van Dedem, Minister of the Colonies, Second Chamber of the States-General, 8 March 1982, Annex IM 84, vol. 3.


EGERIA (6 June - 19 July 1892)

Insert 3

Voyages of HMS *Egeria* and HNLMS *Banda*, 1891 and 1892 interpretation of the Boundary Convention between Great Britain and the Netherlands defining boundaries in Borneo, dated 20 June 1891. Whereas the natural and ordinary meaning of the Treaty is straightforward, as Malaysia has demonstrated in its Memorial, Indonesia writes into the Boundary Convention words that are not there and traces an imaginary "boundary" line 50 miles out to sea to support its claim to Ligitan and Sipadan. Not a word in the 1891 Boundary Convention supports the Indonesian claim.

2.44. The relevant terms of the Treaty are the following:

> "ARTICLE I.
>
> The boundary between the Netherland possessions in Borneo and those of the British protected States in the same island, shall start from 4° 10' north latitude on the east coast of Borneo.
>
> ARTICLE II.
>
> The boundary-line shall continue westward from 4° 10' north latitude, and follow in a west-north-west direction, between the Rivers Simengaris and Soedang...
>
> ARTICLE III.
>
> From the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo, the boundary-line shall follow the watershed of the rivers running ...
>
> ARTICLE IV.
>
> From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands.

> **ARTICLE V.**
>
> The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and British Governments may think fit."[57]

2.45. Malaysia reads the Treaty, according to the natural and ordinary meaning of its terms, as a land boundary treaty and not an allocation treaty, purporting to divide islands fifty miles off the coast. Indonesia claims the contrary.

2.46. The Boundary Convention is the exact reflection of the negotiation process. Article I determines the starting point on the east coast of Borneo. Articles II and III describe the course of the boundary westwards across mainland Borneo. Article IV describes the course of the boundary eastwards, across Sebatik Island to the east coast of the island and no further. Whatever ambiguity might have resulted from such a description is eliminated by the more precise description of the subsequent agreement of 1915, where the starting point is on the east coast of Sebatik Island and the boundary line runs west across mainland Borneo.

2.47. Indonesia advances thirteen arguments in support of its claim.[58] There is no substance in any of them.

(a) *First (according to Indonesia), Article I establishes the boundary between "possessions" and would be providing for territorial attribution of possessions to the Netherlands and to Great Britain. Doing so by way of a straight line out to the sea was a usual method among colonial powers.*

Unfortunately for Indonesia, the text says nothing of the sort. The initial British proposal referred to a "line". The Netherlands insisted on a "boundary-line".[59] The importance of the change should not be overlooked. This was not any delimitation, any ordinary line drawn on a map. Insistent reference to boundaries does not indicate an allocation treaty, but a boundary treaty. The "straight line" out to sea is a pure invention, as the text says nothing of the sort, either for the east coast or for the west coast. The "boundary-line" was necessarily a land boundary-line. At most, it could concern inland waters. But there was no way of qualifying a line out in the open sea, far beyond the three-mile limit, as a boundary-line in 1891.

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[57] Annex MM 17, vol. 2.

[58] IM, para. 5.43, pp. 83-86.

[59] Annex IM 73, vol. 3.

(b) *Second, Article IV provides that, from the starting point laid down in Article I, the boundary line is to be "continued eastward"; the notion of "continuation" would not embrace a line of only limited extent with a nearby terminal point, but rather a line of indeterminate extent.*

But Article II uses the same notion of "continuation" westward, i.e. inland, to a point specified in Article III, Tandjong-Datoe on the west coast.

(c) *Third, in the absence of any specified limit, the line should divide all territorial possessions, in particular islands or territories whose attribution might be problematical.*

But there is a specified limit, the island of Sebatik. The whole purpose of Article IV was to divide the island so as to ensure access by sea to the mainland to each Party.

(d) *Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, an interpretation which would leave open the question of attribution of various small offshore island would be inconsistent with this purpose.*

But the Dutch belief could only concern the adjacent islands mentioned in the official Dutch documents. Nothing in the text of the Treaty or in the Dutch official documents implies such a wild strike 50 nautical miles offshore, way beyond the limits of the territorial sea. Such a provision would have been explicitly mentioned in the text.

(e) Fifth, the history of the negotiations show that the initial British proposal was for a boundary line running out from Broershoek, through the channel between the islands of Sebatik and Nanoekan; such a maritime line would inherently be a line continuing out to the sea.

But Britain never claimed a line continuing out to the sea and there was nothing "inherent" about the proposal. The British North Borneo Company was anxious about access to the rivers, but never contemplated a line continuing out to the sea. In any case, the line was changed and certainly did not "run out to sea".

(f) Sixth, the only indication given as the location of the line is that it runs "along that parallel", i.e. the 4° 10' parallel north. The use of the term "along" would confirm a line of indeterminate length.

But the end of the sentence qualifies the expression: "...along that parallel, across the Island of Sebittik".

(g) Seventh, the words, "across the Island of Sebittik" are a subordinate element; "not a limiting part of the main clause, but merely a subsidiary description".

The attempt to strike out these words on the basis that they are separated from the first part of the phrase by a comma is pure fiction. There is nothing natural and ordinary about such a convoluted grammatical hypothesis.

(h) Eighth, the ordinary meaning of "across" conveys the meaning of "through and beyond" or "crossing and continuing over" the island of Sebatik.

But Indonesia simply strikes out the words after the semi-colon "that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to The Netherlands". The semi-colon indicates a close grammatical and functional relation between the two parts of the sentence. The words mean that the line across the island is to divide the island itself, nothing more, nothing less. Furthermore, there can be little doubt that the word "across" (*over* in the Dutch text) in its ordinary meaning means in such a context: "running along the surface, it extends until: going from one side to the other, with the aim of reaching the other side".[60]

(i) *Ninth, the fact that article IV mentions the island of Sebatik would show that the boundary prescribed by the 1891 Treaty is not limited to the main island of Borneo.*

But Sebatik was mentioned principally because of the issue of access to the rivers by both Parties. And because it was an important island immediately adjacent to the main coast.

(j) *Tenth, that clarification, in a subsidiary clause, should not place a limit on the principal thrust of the text, which is that the boundary continues eastward along the 4° 10' parallel north.*

But the "principal thrust" is imaginary. The clarification says what it says, i.e. that the boundary crosses the island of Sebatik, dividing it into two.

(k) *Eleventh, there was no contemporaneous reason that the 4° 10' north line should have been extended out to the high seas, other than the attribution of islands to one Party or the other.*

Indonesia is correct in that there was no reason, contemporaneous or other, to extend the 4° 10' N line out to the high seas. There were no disputed islands to allocate, as the report of the *Egeria*, among others, clearly demonstrates. That is why such a provision was not included in the Treaty and why the boundary-line stops on the east coast of Sebatik Island.

(l) *Twelfth, continuation of the 4° 10' north line out to the sea would have been consistent with the location of other Dutch possessions to the east, south of the Philippines.*

The 1891 Boundary Convention was not concluded with Spain, but with Great Britain. The issue was not a neat delimitation of the Dutch and Spanish possessions, but the fixing of the boundary on the island of Borneo between the Netherlands possessions and the British Protected States.

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[60] See *Woordenboek der Nederlandsche taal (Dictionary of the Dutch language), vol. XI (ooit-ozon)*, The Hague/Leiden: Nijhoff/Sijthoff, 1910, p. 1591. Text in Dutch: "*F. Het begrip: boven langs de oppervlakte gaande, breidt zich uit tot dat van: gaarde van de eene zijde van iets naar de andere, met het doel aan den overkant te komen.*"

(m) Thirteenth, the evident interest of both Parties to the access to the estuary of the Sibuko river and their contemporaneous joint maritime activities in the area, including Ligitan and Sipadan, would show that their concerns did not stop at the eastern limit of Sebatik but continued eastward into navigationally significant waters out to sea.

Freedom of navigation on Borneo rivers in the vicinity of Sebatik certainly was a preoccupation and was dealt with in Article VI of the Treaty. It was the principal reason why the boundary crossed the island of Sebatik. But it is simply not true that the joint maritime activities of the Parties extended out to sea. They were limited by instructions to the exploration of the rivers concerned and to the east and west coast of the island of Sebatik. Contrary to what Indonesia alleges, the reports of HMS *Egeria* and HNLMS *Banda* show that the Treaty boundary stopped on the east coast of Sebatik and that the islands east of that point were considered by both Parties as lying within British sovereignty.

2.48. Malaysia maintains that the natural and ordinary sense of the words used in the 1891 Convention, its object and purpose, all point to boundary delimitation on the mainland of the island of Borneo and the adjacent island of Sebatik. No mention was made of any delimitation out into the sea. As the arbitral tribunal in the *Guinea/Guinea Bissau* case pointed out, "Dans ce silence des textes, il est fortement à présumer que les négociateurs n'ont jamais envisagé autre chose que des frontières terrestres."[61] A "boundary-line" could in no way be drawn in the open seas, especially in 1891, when maritime delimitation could not extend beyond territorial waters. There is no indication whatsoever that the 4° 10' N parallel would constitute a delimitation of the possessions of the Parties out at sea. Ligitan and Sipadan are not mentioned directly or by any sort of implication compatible with the rules of interpretation of international treaties. The rest is "imaginary".

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[61] Arbitral award, 14 February 1985, para. 79.

F. The Ratification of the Boundary Convention and the Map

2.49. Indonesia's "trump card" is a map attached to the Memorandum of Explanation submitted by the Netherlands Government to the two Chambers of the States-General. In fact it is quite a lonely card.

2.50. The main point is that *there is no map*. There is no map attached to the Boundary Convention. There is no map mentioned in the Boundary Convention. The Parties never agreed to a map. True, there is an official map, but it is not the one mentioned by Indonesia. It is not attached to the 1891 Boundary Convention, but to the 1915 Agreement and will be examined shortly. But given the importance of the internal domestic map for the Indonesian case, it will be first considered within its context, i.e. the ratification debate. In that perspective, it is important to state the facts correctly before analysing the legal consequences.

(1) The facts

2.51. The ratification procedure of the 1891 Boundary Convention in the Netherlands started immediately after the signing of the 20 June Boundary Convention. The Dutch Government drafted an Explanatory Memorandum (*Memorie van Toelichting*), dated 25 July 1891 to accompany the Bill of ratification, submitted to the two Chambers of the States-General.[62] The Commission of Reporters reported to the Second Chamber of the States-General on 2 December 1891.[63] The Government on 20 February 1892 submitted a Memorandum in Response, answering certain parliamentary questions.[64] The Second Chamber examined the report on 8 March 1892.[65] The Committee of Rapporteurs of the First Chamber adopted its Final Report on 31 March 1892.[66] The

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[62] Annex MM 51, vol. 3.

[63] Annex MM 53, vol. 3. The order of the two Memoranda is mistakenly inverted in volume 3 of the Malaysian Memorial.

[64] Annex MM 52, vol. 3.

[65] Annex IM 84, vol. 3.

[66] Annex IM 85, vol. 3.

First Chamber examined and adopted the Report on 1 April 1892.[67] The Netherlands ratified the Boundary Convention on 20 May 1892.[68] Ratifications were exchanged in London on 22 May 1892.[69]

2.52. The 1891 Boundary Convention was the object of close and careful scrutiny. The Explanatory Memorandum was discussed, questions were asked, objections were voiced. Certain members considered that the Dutch negotiators should have kept to the blue line on the map and refused to cede Batu Tinagat. Others would have preferred arbitration. The Government reaffirmed that it was not ceding any territory. The Minister of Foreign Affairs pointed at the objective of a "satisfactory border on the entire width of the island of Borneo." An arbitration could not have produced such a result. The division of the island of Sebatik would allow to "control all access to the deltas beyond" and exclude any danger of future border issues.

2.53. No islands were mentioned other than Sebatik, except for a fleeting reference in the Report to the First Chamber to "neighbouring small islands". There certainly was no mention of any line running out into the open sea.

2.54. The internal Dutch map was attached to the Explanatory Memorandum.[70] It carries, among other lines, one line coloured red, which extends to the open sea for approximately 50 miles (less than ten miles in the first draft[71]). It does not show the islands in dispute, but only P. Mabul. It was not an agreed map and was drawn unilaterally by the Dutch Government after the conclusion of the

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[67] Annex IM 86, vol. 3.

[68] Annex IM 88, vol. 3.

[69] IM, para. 5.44.

[70] Annexes MM, vol. 5, Map 2.

[71] Malaysia produced the first draft of the internal map in its Memorial, Insert 15, p. 98. The existence of an earlier draft is hinted at in IM, para. 6.46, pp. 115-116, but the map was not produced.

Boundary Convention.[72] The very first draft was made by the Dutch Ministry of Colonial Affairs on 23 June 1891[73].

2.55. Why then the discrepancy between the text of the Boundary Convention and the Map? Why then the red line running out to the sea? No question was asked by the members, no explanation was given by the Ministers. As Malaysia pointed out in its Memorial, an earlier draft of the map showed a shorter line eastward out to the sea, slightly beyond Batu Tinagat.[74] The map annexed to the Memorandum of Explanation shows as the British Government proposal a green line out to the sea, slightly beyond Sebatik and Nunukan. But it shows no line out to sea at Batu Tinagat for the initial Dutch claim. Why was the red line lengthened between the two drafts? To indicate the course of the 4°·10' north parallel? Why was it not continued out until it met the Spanish possessions? There is no logic to all this. And nobody seemed to care.

2.56. The Dutch Government does not seem to have attached particular importance to the map, except to illustrate the proposed land boundaries. The Commission of Reporters of the Second Chamber asked for a declaration of the Government to the effect that "all that lies south of the new border should be recognised by Great Britain as: 'the Netherland possessions in the Island of Borneo'."[75] In its Memorandum in response, the Government answered that:

> "The Government need also have no hesitation in making the desired declaration that all that lies south of the border (as defined in the agreement) be acknowledged by the British as being: "the Netherlands possessions *in the island of Borneo*."[76]

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[72] MM, paras. 9.2-9.15, pp. 96-102.

[73] ARA, *Min.van Kol.*, 2.10.02, inv. No. 6202; MM, Insert 15, p. 98.

[74] MM, pp. 97-98.

[75] Annex MM 53, vol. 3.

[76] Annex MM 52, vol. 3 (emphasis added).

The Government would certainly have referred to the map and not only to the agreement if it had intended to continue the boundary out to sea, as nothing of the sort was "defined in the agreement".

2.57. The Government was criticised by the opposition for giving up Batu Tinagat. Nobody had ever pretended that territory east of Batu Tinagat had been under Netherlands sovereignty in the past, quite to the contrary.[77] If the Government had considered a delimitation at sea as a compensation for accepting the 4° 10' north parallel, it would have used the argument in the parliamentary debate. Nobody pointed to the issue, because it was a non-issue.

2.58. This also explains why the British Government did not react to the Map. There is no evidence that the Map was officially communicated by the Dutch Government to the British Government,[78] but it was available for consultation in the Dutch Parliament and was to that extent "a matter of public knowledge" for those concerned.[79] The British Minister in The Hague, Sir Horace Rumbold, did call the attention of the Marquis of Salisbury to the Map in his despatch of 26 January 1892.[80] But he did not single out the line running out to the open sea. Neither Sir Edward Hertslet nor Lord Salisbury reacted, because it was a purely indicative document for the Dutch Parliament, drawn for illustrative purposes. What interest Rumbold found in the Map was more probably the land boundary as traced across the island of Borneo and the comparison between the four proposals.

2.59. To sum up, in relation with the present dispute:

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[77] See above, paragraph 2.16.

[78] Despite a search of the files, no formal note or letter of transmittal by the Dutch to the British Government has been found, and none has been produced by Indonesia. Rumbold's own letter implies that there was no formal communication; he simply says that the map "has lately been published in the official journal": Annex IM 81, vol. 3.

[79] IM, para. 5.54., p. 91

[80] Annex IM 81, vol. 3.

(a) The Dutch Parliament scrutinised very closely the Boundary Convention.

(b) Neither the Government, nor the majority, nor the opposition ever suggested that the boundary-line extended to the open sea.

(c) The Map attached to the Explanatory Memorandum was used for illustrative purposes in the debate, but no one asked any question or even seemed to notice the extension of the 4° 10' north red line 50 miles out at sea. When questioned about Dutch possessions south of the boundary line, the government referred to the text of the Boundary Convention and not to the Map.

(d) The British Government did not react to the Map, which was an internal Dutch document used only for illustrative purposes in the parliamentary debate.

(2) Legal consequences of the ratification debate

2.60. The ratification debate gave an interesting indication of the view of the Netherlands Government and Parliament on the 1891 Boundary Convention. It certainly confirmed the opinion that the Boundary Convention was only concerned with the land boundary and the island of Sebatik. It added nothing to the text of the Convention.

2.61. The Map attached to the Explanatory Memorandum did not appear as a "contemporary exposition by the Dutch Government of the meaning of Article IV of the 1891 Convention."[81] But even if it were so, it would be irrelevant for the interpretation of the 1891 Boundary Convention for the following reasons.

2.62. The Map cannot be considered as an element of the *travaux préparatoires*. It was drawn unilaterally by one of the Parties and after the signature on 20 June 1891 of the Convention. It can give no indication as to the common intention of the Parties in the drafting of the Convention.

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[81] IM, para. 5.51., p. 88.

2.63. The Map is certainly not an element of the context within the meaning of Article 31 (2) (b) of the Vienna Convention on the Law of Treaties. The Dutch Government or Parliament made no attempt to incorporate it into the Treaty. The Dutch act of ratification says nothing of the sort.[82] The other Party did not accept it as an instrument related to the treaty.

2.64. Indonesia's comparison with the *Livre jaune* map in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case[83] is not to the point. The text of the Declaration of 1899 was "not free from ambiguities... Different interpretations were possible."[84] The *Livre jaune* map was not annexed to the 1899 Franco-British declaration, but the Parties repeatedly referred it to as if it had been annexed. Speaking of the Franco-Italian exchange of letters of 1900, the Court noted that "The map referred to could only be the map in the *Livre jaune* which showed a pecked line indicating the frontier of Tripolitania."[85] In the present instance, quite to the contrary, the Parties *never* referred to the map after it was produced for the purposes of the Dutch parliamentary debate. Instead, they took the opportunity of the first subsequent agreement to annex a very different map illustrating their true common intention, as will be shown.

2.65. There is no similarity with the *Temple*[86] case either. The internal Dutch map was never the subject of negotiations between the two Governments. The circumstances did not call for any particular reaction, as the map had not been mentioned in the parliamentary debate and no one had noted the extension of the boundary-line out to the sea. Moreover, the map was never used or even referred to by the Parties, either before ratification of the treaty or at a later stage, in the implementation and interpretation of the Boundary Convention. The Parties, by their conduct, certainly did not recognise the red line on the internal Dutch map as a boundary-line. To the contrary, they formally agreed in 1915 to a map which showed that the boundary-line did not run out to sea.

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[82] Annex IM 88, vol. 3.

[83] IM, para. 5.52., p. 90

[84] I.C.J. Reports 1994, p. 30 (para. 58).

[85] I.C.J. Reports 1994, p. 37 (para. 61).

[86] *Temple of Preah Vihear, Merits*, I.C.J. Reports 1962, p. 6 at pp. 23, 32-34.

2.66. Indonesia insists on the considerations of stability and finality as an important objective in boundary settlements.[87] Malaysia agrees. But there was no territorial dispute as to sovereignty on islands beyond the land boundary in Borneo, either westwards beyond Tanjong Datu with Sarawak or eastwards beyond Sebatik with British North Borneo. No one could imagine a wild claim fifty miles out at sea. The Boundary Convention, as drafted, was considered by both Parties as a stable and final settlement and proved so for nearly a century.

G. The Subsequent 1915 Agreement

2.67. In Malaysia's opinion, the practice of the Parties to the 1891 Boundary Convention does not qualify as subsequent practice in the sense of Article 31 (3) (b) of the Vienna Convention on the Law of Treaties. That practice will be considered later. But Article 31 (3) (a) of the Vienna Convention considers that there shall be taken into account, together with the context, "any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions".

2.68. There is an important subsequent agreement that must be taken into consideration for interpretation of the 1891 Boundary Convention: the 1915 Agreement. The Indonesian Memorial notes that "Further clarifications of the line on mainland Borneo were made by a subsequent Agreement of 1915 and by a 1928

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[87] IM, paras. 5.59 ff.

Convention between The Netherlands and Great Britain in implementation of Article V of the 1891 Convention."[88] The Memorial adds: "Clearly, since the line had been determined by reference to a parallel of latitude, its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation."[89] In other words, it all but ignores the subsequent agreement. But, contrary to what is asserted by Indonesia, the 1915 Agreement also concerns the boundary on the Island of Sebatik and eliminates any possible misunderstanding as to the meaning of Article IV of the 1891 Convention.

2.69. Article V of the Boundary Convention called for eventual subsequent agreements to delimit the boundary between the Parties. Britain and the Netherlands agreed that knowledge of Borneo was scant in 1891 and that the boundary should be more fully explored and determined by the Parties. Article V states:

> "The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and British Governments may think fit."

2.70. Article V was used twice, in 1915 and 1928, to determine the exact positions of the boundary-line. The first time was by the Agreement signed in London on 28 September 1915 by Lord Grey and R. de Marees van Swinderen.[90] A problem had arisen in 1905 as to the interpretation of Article II of the Convention. The Dutch Government disagreed with the BNBC as to the course of the boundary inland from Broershoek. After investigation, the British Government accepted the Dutch interpretation of Article II.[91] Commissioners were later appointed to demarcate the sector of the boundary concerned. Astronomical observations and topographical surveys were made, pillars were erected. The Commissioners reported their agreed solutions in the Tawao Report of 1913; these were incorporated in the 1915 Agreement. The Agreement concerns the boundary-line between the State of British North Borneo and the Netherlands possessions in the island, starting on the west coast of the island of Sebatik and running inland on Borneo till it meets the watershed between the Sedalir and the Sejasap rivers.

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[88] IM, para. 3.62., p. 28.

[89] IM, para. 5.65., p. 97.

[90] For the text of the Agreement, Annex IM 118, vol. 3. (without the map); Annex MM 27, vol. 2 (with the map); the map is included in Annexes MM, vol. 5, Map 23.

[91] Baron Gericke to Marquess of Lansdowne, 16 March 1905; Marquess of Lansdowne to Baron Gericke, 18 October 1905. See Annex MCM 2, vol. 2.

2.71. The Preamble of the Agreement states:

> "His Britannic Majesty's Government and the Government of Her Majesty the Queen of the Netherlands have agreed in a spirit of mutual goodwill to confirm the joint Report with the accompanying map prepared by their respective Commissioners in accordance with Article 5 of the Convention signed at London on the 20th June 1891, for the delimitation of the boundary line between the States in the Island of Borneo which are under British protection and the Netherland possessions in that island, and relating to the boundary between the State of North Borneo and the Netherland possessions in the island..."[92]

2.72. The Preamble is interesting in that it explicitly refers to Article 5 of the 1891 Boundary Convention. It agrees on the joint report with the accompanying map, which is an official map, annexed to the Agreement.

2.73. Paragraph 3 of the Tawao Report of 1913 concerns the coastal boundary. It is in the following terms:

> "3. We have determined the boundary between the Netherland territory and the State of British North Borneo, as described in the Boundary Treaty

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[92] Annex IM 118, vol. 3.

> supplemented by the interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments in 1905 as taking the following course:
>
> (1) Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude, as already fixed by Article 4 of the Boundary Treaty and marked on the east and west coasts by boundary pillars.
>
> (2) Starting from the boundary pillar on the west coast of the island of Sebetik, the boundary follows the parallel of 4° 10' north latitude westward until it reaches the middle of the channel, thence keeping a mid-channel course until it reaches the middle of the mouth of Troesan Tamboe.
>
> (3) ..."[93]

2.74. Paragraph 3 (1) confirms that the boundary line starts on the east coast of the island of Sebatik, traversing the island following the parallel of 4° 10' N. Whereas the 1891 Boundary Convention line, for reasons analysed above, started on the east coast at Broershoek and ran both westwards, towards inland Borneo, and eastwards, across Sebatik Island, the 1915 boundary-line more logically starts with the easternmost point, on the east coast of Sebatik, and runs due west, through the Island of Sebatik, then across to the coast and through mainland Borneo. Nothing is said about any continuation whatsoever of line eastwards into the open sea. Reference to the "interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments" implicitly, but decisively, excludes any other mutually accepted agreement in the vicinity. If the Netherlands had really believed that such an agreement existed in 1891 to prolong the line out to the sea, that agreement would necessarily have been mentioned.

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[93] Annex MM 25, vol. 2.

2.75. The map attached to the 1915 Agreement confirms that the boundary did not extend out to the open sea. It is an official map, attached to the agreement and mentioned in the Preamble. It represents the common intent of the Parties as to the exact location of the boundary. The red dotted line representing the boundary clearly starts from the east coast of the island of Sebatik and does not extend to the sea. Beyond Sebatik, eastwards, the 4° 10'N parallel is depicted by the same straight black lines as the other parallels shown on the map. An extract from the official map attached to the 1915 Agreement is shown on the following page, as Insert 4.

2.76. The importance of this map need hardly be underlined. It certainly supersedes any alleged agreement to the internal Dutch map of 1891. The text of the 1915 Agreement and the official map attached, in Malaysia's opinion, are conclusive.

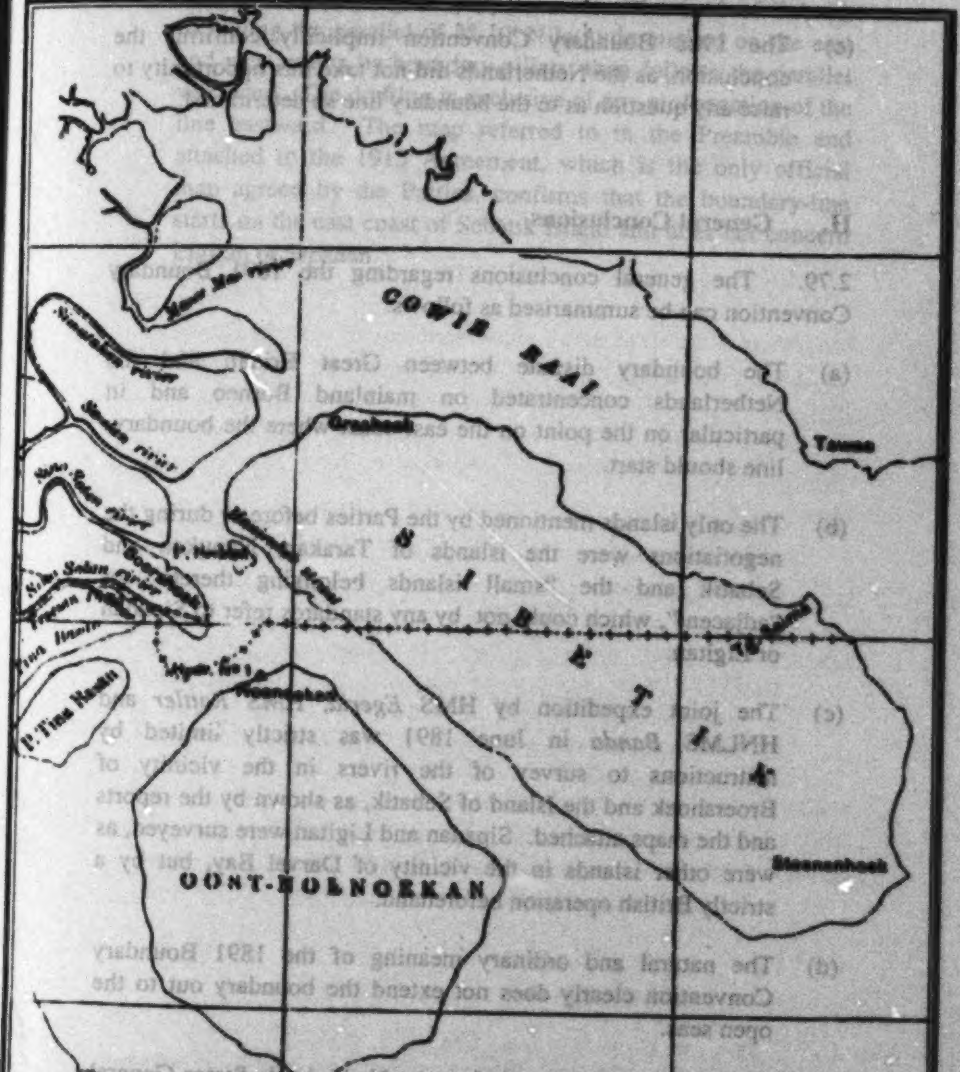
2.77. If necessary, the 1928 Boundary Convention confirms the 1915 Agreement. Not that it adds anything to the text or the map. It is only concerned with an inland sector of the boundary, from the summits of Gunong Api to Gunong Raya. But it certainly was another opportunity, for the Netherlands Government, if it had any second thoughts, to correct the 1915 Map and Agreement, in particular if it had considered the HNLMS *Lynx* cruise of 1921 as calling for an affirmation of sovereignty east of Sebatik. But such was not the case.

2.78. To sum up, the subsequent Agreements of 1915 and 1928 are relevant to the issue of sovereignty over Ligitan and Sipadan in the following way:

(a) The 1915 Agreement clearly interprets the 1891 Boundary Convention as starting the boundary line on the east coast of Sebatik Island and running west along the 4° 10' N parallel with no extension east into the open sea.

Insert 4

Map Accompanying the 1915 Agreement relating to the Boundary between the State of North Borneo and The Netherlands Possessions in Borneo (Enlargement) (Extract)


COWIE BAAI
Grasshoek
Tawau
SIBETIK
Steenenhoek
OOST-HOEKNOEKAN

(b) The official map attached to the 1915 Agreement, which is the only official map relevant to the case during the colonial period, confirms that there is no boundary line beyond the island of Sebatik.

(c) The 1928 Boundary Convention implicitly confirms the conclusion, as the Netherlands did not take this opportunity to raise any question as to the boundary line so determined.

H. General Conclusions

2.79. The general conclusions regarding the 1891 Boundary Convention can be summarised as follows.

(a) The boundary dispute between Great Britain and the Netherlands concentrated on mainland Borneo and in particular on the point on the east coast where the boundary-line should start.

(b) The only islands mentioned by the Parties before or during the negotiations were the islands of Tarakan, Nunukan and Sebatik and the "small islands belonging thereto" or "adjacent", which could not by any standards refer to Sipadan or Ligitan.

(c) The joint expedition by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda* in June 1891 was strictly limited by instructions to survey of the rivers in the vicinity of Broershoek and the Island of Sebatik, as shown by the reports and the maps attached. Sipadan and Ligitan were surveyed, as were other islands in the vicinity of Darvel Bay, but by a strictly British operation beforehand.

(d) The natural and ordinary meaning of the 1891 Boundary Convention clearly does not extend the boundary out to the open seas.

(e) The ratification debate before the Netherlands States-General at no point mentioned the disputed islands. The internal Dutch map attached to the Explanatory Memorandum was the object of no specific comment during the debate and did not call for any particular reaction.

(f) The subsequent Agreement of 28 September 1915 starts by stating that the frontier line traverses the island of Sebatik following the parallel of 4° 10' N latitude marked on the east and west coasts by boundary pillars, then follows the parallel westward. The drafting is exclusive of any prolongation of the line eastward. The map referred to in the Preamble and attached to the 1915 Agreement, which is the only official map agreed by the Parties, confirms that the boundary-line starts on the east coast of Sebatik Island and does not concern Ligitan or Sipadan.

Chapter 3

MALAYSIA'S RIGHT TO THE ISLANDS BASED ON ACTUAL ADMINISTRATION COMBINED WITH A TREATY TITLE

A. Introduction

3.1. Chapter 7 of the Indonesian Memorial discusses the relations between British North Borneo, Spain and the United States. It seeks, naturally enough in the context of the present dispute, to dismiss as irrelevant such events as the voyage of the USS *Quiros* (during which the United States expressly claimed sovereignty over the two islands), and such transactions as the 1878 Sulu grant, the 1907 Exchange of Notes and the 1930 Boundary Convention between Great Britain and the United States. Malaysia's position on these transactions was set out in Chapter 5 of its Memorial, and may be shortly summarised:

(a) Before 1878, the Dutch Government expressly recognized "the authority of Spain over the dependencies of Sulu in the north-east portion of the island",[1] and an authoritative Dutch map of the period clearly showed "Siparan" and "Legetan" as within the dominion of Sulu.[2] This was a simple recognition of the factual situation, since at no stage did the Netherlands nor its vassal Bulungan exercise any authority to the east of Batu Tinagat, and even south and west of Batu Tinagat their authority was largely nominal.[3]

(b) BNBC authority over the territory covered by the Sulu grant of 1878 (extending down to the Sibuko River) was expressly recognised by Spain in the Protocol of 7 March 1885.[4]

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[1] Annex MM 40, vol. 3.

[2] MM, para. 5.8, p. 35 & Annex MM, vol. 5, Map 3.

[3] As the responsible Dutch Ministers acknowledged in the Dutch Parliament: MM, para. 5.8, p. 35 & Annex MM 51, vol. 3.

[4] MM, para. 5.18 & Annex MM 15, vol. 2.

(c) The Sulu grant of 1878 did not extend to islands (such as Sipadan and Ligitan) which were more than 9 nautical miles offshore, but in fact these islands were administered by the BNBC and were occupied and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC.[5]

(d) Although Spain never insisted on the 9 nautical miles limitation in the grant of 1878, the United States did so, and it laid claim to the islands as successor to Spain after 1900, both by performance of ceremonial acts on the islands,[6] by a map,[7] and in diplomatic correspondence with Britain.[8] United States sovereignty was acknowledged by Britain in the Exchange of Notes of 1907 and accompanying map,[9] but the BNBC continued to administer them with the agreement of the United States.

(e) This situation continued until the Anglo-American Convention of 1930, which rectified the line dividing their respective island possessions, and retroceded to Britain all the islands, covered by the 1907 Exchange of Notes, which lay to the west and south of the line drawn by that Treaty.[10] Sipadan and Ligitan lay to the west and south of that line.

(f) The BNBC, Britain and Malaysia have continued to administer the islands ever since 1930. There was no protest from the Netherlands or Indonesia to this administration until the dispute suddenly broke out in 1969.[11]

3.2. Nothing in the Indonesian Memorial casts any doubt on these conclusions. Reliance upon definitions of the Sulu Archipelago, in an attempt to show that the Sultan of Sulu had no claims to the two islands, ignores the fact that, in addition to his control over Sulu itself, the Sultan claimed allegiance over a significant portion of the north and east coasts of Borneo, at least down to the Sibuko River, as well as the fact that the local people acknowledged their allegiance to the Sultan. In particular, Malaysia demonstrated in its Memorial the allegiance of the Bajaus of Danawan and surrounding islands to Sulu.[12] Individuals on Danawan had and exercised the right to collect turtle eggs on Sipadan.[13] That right had been granted and confirmed by the Sultan of Sulu. Following the Sulu grant of 1878, and the effective takeover of Sulu by Spain later in the same year, their allegiance was transferred to the BNBC.[14] The east coast settlements of the BNBC — including Sandakan, Lahad Datu, Semporna and, after 1892, Tawao — became the new focus of the trade and administration of the local Bajaus. The captain of the *Quiros* noted in 1903 that disputes over turtle egg collection on Sipadan were taken to the BNBC Resident at Lahad Datu.[15]

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[5] MM, paras. 5.19, 5.28, 5.31-5.34, 6.5-6.8 & documents there referred to.

[6] MM, paras. 5.24-5.29, pp. 43-48.

[7] Annexes MM, vol. 5, Map 5.

[8] Annexes MM 65-67, vol. 3 ; MM, paras. 5.36-5.38, pp.52-55.

[9] Annexes MM, vol. 5, Map 6.

[10] Annex MM 29, vol. 2 ; MM, paras. 5.34-5.44, pp. 51-58.

[11] MM, para. 4.3, p. 27; IM, Ch. VIII deals with the negotiations, and the element of "surprise", at length. The impartial reader will observe (a) that it was Malaysia's delegation which was surprised and unready to counter a new and previously unheard of claim, and (b) that who was surprised by whom in 1969 no longer matters.

3.3. Faced with detailed evidence of this kind, as well as evidence of international transactions (specifically affecting the islands off Semporna) between the BNBC under British protection, Sulu, Spain and the United States, Indonesia's repeated reliance on the 1891 Boundary Convention is merely conclusory. There is not the slightest evidence that any of the actors (including the Netherlands itself) considered that Convention to have any relevance to the islands off Semporna, including the two islands in dispute. In the years after 1878, these were incontrovertibly part of the social and administrative system of Darvel Bay and surrounding islands, including Si Amil and Danawan. The 1891 Boundary Convention was wholly irrelevant, and remained so until it became the focus of the Indonesian claim in 1969.

3.4. The Indonesian counter-arguments will be briefly dealt with in this Chapter, first in relation to the Sulu/Spanish period before 1900, then in the context of the relations between Britain on behalf of North Borneo and the United States.

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[12] MM, paras. 6.5-6.7, pp. 61-64.
[13] MM, paras. 6.9-6.21, pp. 65-68.
[14] MM, para. 5.7, pp. 33-34 & para. 6.5, pp. 61-63.
[15] MM, para. 5.28, pp. 47-48.

B. The East Coast Islands of Borneo, Sulu and Spain

3.5. An initial point of agreement between the parties should be noted. There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*.[16] They were part of the social system of the local people, and there was at all times a social and political organization including those people, within the meaning of that term as expressed by the Court in the *Western Sahara* advisory opinion.[17] Thus when the Sultan of Sulu granted to the promoters of the BNBC all the islands within 9 nautical miles (3 marine leagues) of the coast, it was not because the islands outside that line did not belong to him; on the contrary, they were formally reserved from the grant.

3.6. The parties also agree that Sipadan and Ligitan fell outside the terms of the Sulu grant of 1878 because they were outside the 9 nautical mile line.[18] But these seem to be the only points of agreement in the present case, and it is to the points of disagreement that we must turn.

(i) The extent of the Sultanate of Sulu before 1878

3.7. It is not necessary for present purposes to discuss the earlier acquisition by Sulu of its possessions on Borneo.[19] The fact of those possessions was noted by Spain in the Capitulations of 1836,[20] and it was also clearly recognised by the Dutch.[21] The only point to note here is that the controversy related to the competing claims of the Sultan of Brunei: there is nowhere in any of the papers or records of the time any suggestion that the Sultan of Bulungan had any claim or interest in islands off the Semporna peninsula.

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[16] IM, para. 4.1, p. 37.

[17] ICJ Reports 1975 p. 12.

[18] IM, para. 7.4, p.130; cf. MM, Insert 8, p. 39.

[19] See IM, paras. 4.29-4.30, pp.46-47 & MM, para. 5.5, pp. 31-32.

[20] Annex MM 1, vol. 2.

[21] MM, paras. 5.8 & references.

3.8. In 1878, the Sultan granted to the BNBC's promoters all the east coast of Borneo and offshore islands within 9 miles, down to the Sibuko River. The sketch map in the Indonesian Memorial is misleading, since it only shows the 1878 grant extending down to Sebatik, approximately at 4°10'N.[22] This is an anachronism: in fact, of course, the 1878 grant extended considerably further south. It was in response to that grant and to the subsequent extension of BNBC administration on the east coast that the Dutch laid claim to Batu Tinagat. But the Dutch claim expressly did not extend anywhere to the east of Batu Tinagat, and certainly not to islands off (what became) Semporna.[23] Dutch and British maps of this period, showing the area in dispute, are entirely consistent and clear on this point.

3.9. Indonesia asserts, first, that the Sultanate of Sulu did not have any claim to the islands,[24] and secondly, that those islands were part of the (Dutch) Sultanate of Bulungan.[25]

- The **first** proposition is belied by the evidence of actual allegiance of the local people (in particular the Bajaus of Si Amil and Danawan) to Sulu,[26] as well as by Dutch maps and statements.[27] It should be noted that in 1891, the Netherlands accepted the effect of the 1878 grant in relation to the northern half of Sebatik itself and areas inland, and this was consistent with earlier Dutch recognition of the Sulu dominions in northeast Borneo.[28] The 4°10'N line was only adopted after agreement had been reached on Broershoek as the place on the coast where the boundary across the mainland could start. Picking on Broershoek was an obvious compromise between overlapping claims: the British did not press the BNBC claim between Broershoek and the Sibuko River; the Dutch withdrew their earlier claim to territory between Broershoek and Batu Tinagat. The 4°10'N line was a further compromise so far as concerned Sebatik itself, in order to ensure that each party had access by sea to their respective coasts behind Sebatik. None of this had anything to do with offshore islands much further to the east, which the Dutch had earlier recognised, and continued to recognise, as part of the dominions of Sulu/Spain, to the extent that they were not part of North Borneo itself.

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[22] IM, Map 3.1, opposite p. 14. See, more accurately, MM, p. 39.

[23] See MM, para. 7.3, p. 73.

[24] See e.g. IM, para. 7.4, p. 130.

[25] See IM, Map 4.2, opposite p.54 (though even this is equivocal).

[26] See MM, para. 5.7, pp. 33-34.

[27] See MM, para. 5.8, pp. 34-36.

[28] Indonesia argues (IM, para.7.36, p. 141) that the two islands in dispute do not lie "between" Mindanao and Borneo within the meaning of Article II of the 1885 Protocol. But Article II has to be read in its context, having regard to its reference to the islands administered by the BNBC which were or had been part of the Sultanate of Sulu. See below, paragraph 3.11.

- As to the **second** proposition, the Indonesian Memorial produces no single item of evidence linking the two islands, or any other island east of Sebatik, to Bulungan. No single person from, or owing allegiance to, Bulungan is named in the Indonesian Memorial as having had any association with these islands; compare the many individual Bajaus named in the Malaysian Memorial and referred to in the annexes and in the literature. No single document is cited which mentions the islands by name in terms which indicate that they were claimed by Bulungan or the Netherlands. For the crucial Dutch period, Indonesia confines itself to the statement that Sipadan and Ligitan were among the "small islands belonging thereto" (i.e. to Sebatik), referred to in the Dutch contracts with Bulungan of 1850 and 1878.[29] This is mere assertion. Malaysia attaches to this Counter-Memorial a report by a reputable Dutch historian of the Netherlands East Indies, dealing with the status and extent of the Sultanate of Bulungan.[30] The report makes it clear that Bulungan in the nineteenth century was a small land-based sultanate, with no claim to effective control over the islands off the Semporna peninsula. The same conclusion follows from the Dutch map of 1913, based on an administrative decision establishing the boundaries of districts in East Borneo. The district based on Bulungan stops at the east coast of Sebatik.[31]

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[29] IM, para. 4.66, p. 58 & para, 4.70, p. 59.

[30] See below, Appendix 1, Prof.dr.V.J.H. Houben, "The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)".

[31] See below, Insert 12, p. 106.

3.10. In its Memorial Indonesia relies on various definitions of the "Sulu Archipelago" which in its view exclude the disputed islands. The argument proves too much, since it is clear that the Sulu Archipelago as a geographical entity did not include Borneo or adjacent islands, yet everyone at the time accepted the existence of Sulu dominions there. Throughout the nineteenth century, the British Government insisted on the distinction between the Sulu Archipelago itself and Sulu possessions on the island of Borneo, and made it clear that, even if it came to recognise Spanish claims to the Archipelago, it would not allow Spain to acquire any part of Borneo. This can be seen by a brief examination of the documents and definitions on which Indonesia now relies.

3.11. The first of these is the 1836 Capitulations of Peace, Protection and Commerce between Spain and Sulu.[32] Indonesia remarks that the definition of Sulu given in Article I related only to North Borneo, and that the islands in dispute lie "well to the south and west of any areas that could realistically be considered to lie between Mindanao and the North Borneo mainland".[33] But Article I of the Capitulations makes no reference to "North Borneo" at all: it would have been anachronistic to do so. Rather Article I refers to "the islands situated within the limits of the Spanish jurisdiction"[34] as including the area which extends, "…… from the western point of Mindanao (Mangidanao) to Borneo…, with the exception of Sandakan and the other countries tributary to the Sultan *on the continent of Borneo*"[35] (emphasis added). Nothing is said in Article I about how extensive these Borneo territories are, but they are all excepted from the scope of the Capitulations. Indonesia also ignores the contemporary evidence of Hunt that at this time there was a Sulu province of Tirun to the south of Mangidora, and also to the south of the Sibuko River.[36]

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[32] Annex MM 1, vol. 2.

[33] IM, para. 7.24. p.136.

[34] Annex MM1, vol. 2.

[35] Ibid.

[36] See the passage from Hunt's account (1837), cited in MM, para. 5.4, p. 31 and for the complete account, Annex MM 34, vol. 3.

3.12. Secondly, Indonesia relies on Articles 1-3 of the 1885 Protocol to show that "Sipadan and Ligitan did not constitute part of the Sulu Archipelago".[37] Again this confuses the Sulu Archipelago as a geographical entity and the extent of the dominions of Sulu. The fact that the Sultan did not grant islands beyond 3 marine leagues to the BNBC did not mean that he did not claim or own those islands, or that the islands were part of the Sulu Archipelago in the geographical sense. There could have been, and were, islands adjacent to the coast of Borneo which were not granted to BNBC in 1878: Danawan itself was in that category, yet no one has suggested that it was part of the Sulu Archipelago. It should be stressed that Articles 1-3 of the 1885 Protocol constitute an express recognition by Spain of the extent of the BNBC's territory in Borneo based on the Sulu grant of 1878. In other words, Spain expressly recognised the BNBC's control down to the Sibuko River. If BNBC territory extended so far south, no one could possibly have argued that two small islands in Darvel Bay had somehow been reserved for the Dutch.

3.13. Thirdly, Indonesia relies on the limited definition of the Sulu Archipelago in a Spanish encyclopedia of 1927.[38] In accordance with that definition, the Sulu Archipelago lay well to the east. Again the definition seems to refer to the archipelago as a geographical and not a political entity, and it was certainly not concerned with the Sulu provinces on Borneo 50 years earlier. Spain itself had no doubts that the Sulu dominions extended to Borneo, as witness its attempt to take Sandakan in 1878.[39]

3.14. The clear distinction drawn in the State practice and treaties between the Sulu Archipelago and the Sulu possessions on Borneo is in the end conceded even by Indonesia. It concludes by asserting that "Sipadan and Ligitan... never formed part of the Sulu Archipelago, and they were not part of the Sultan of Sulu's Bornean dominions *either*."[40] Malaysia agrees with the former proposition: it is clear that

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[37] IM, para. 7.29, pp. 138-139. For the 1885 Protocol see Annex MM 15, vol. 2.

[38] IM, para. 7.24. p. 136.

[39] As to which see MM, para. 5.17, p. 40.

[40] IM, para. 7.25, p.136 (emphasis added).

Sipadan and Ligitan, like Danawan, Si Amil and Omadal, were considered at the time as appurtenant to Borneo and not as part of the Sulu Archipelago itself.[41] But the Indonesian Memorial does not begin to demonstrate the latter proposition, and the evidence adduced by Malaysia clearly contradicts it.

(ii) The effect of the Grant of 1878 and the Confirmation of 1903

3.15. As to the Sulu grant of 1878, Indonesia contents itself with noting that the two islands in dispute fell outside the scope of that grant, because they were more than 9 nautical miles offshore.[42] It goes on to stress the significance of the administrative boundaries of North Borneo, as shown on Stanford's map of 1903.[43] That map will be dealt with in Chapter 5:[44] for present purposes it is enough to note that (despite Indonesia's claims to the contrary) the map shows Ligitan as within the administrative boundary of Elphinstone Province. It is true that Sipadan is shown as outside that boundary, but it is not shown as Dutch, and in fact it was administered (as were the islands in the Ligitan group) from the provincial administrative centre, Lahad Datu. Later maps do not show the administrative boundary of the Lahad Datu district with any form of southerly closing line,[45] and Sipadan was specifically included in administrative maps issued by North Borneo for such relevant purposes as the protection of turtles and wild life.[46] It may also be noted that the Dutch administrative map of 1913 shows the district of Bulungan as stopping at the east coast of Sebatik, and makes no attempt to portray the islands to the east around Semporna.[47]

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[41] The distinction is made by Hunt in his account of Sulu (1837) quoted in MM, para. 5.4, p. 31; see Annex MM 34, vol. 3. Hunt refers to the Sulu province of Mangidora (including P. Gaya and P. Sipadan), and notes that the province extends *"towards the Sulo Archipelago* in a long narrow point named Unsang, or cape Misfortune" (emphasis added). See also the sketch map above, opposite page 1.

[42] IM, para. 7.10, pp. 131-132.

[43] IM, paras. 7.13-7.14, pp. 132-133 & Map 6.4, opposite p.118.

[44] See below, paras. 5.10-5.11.

[45] See below, paras. 5.21, (b), (d), (f).

[46] See e.g. MM, Annexes, vol. 5, Maps 13 & 18.

[47] See below, para. 5.15, and Insert 12, at p. 106.

3.16. Indonesia also deals briefly with the Sultan of Sulu's "Confirmation" of 1903. It argues that it did not extend to Sipadan and Ligitan since "all of the islands mentioned in the Confirmation lie to the north of the 4°10' N line of latitude".[48] This of course begs the question. The Confirmation made no mention of the 4°10' N line or of the 1891 Convention. It listed only inhabited islands, including the two in the Ligitan group, but it also referred to "the other islands that are situated alongside, or round or between the islands that are above mentioned". In fact the 1903 Confirmation (the legal validity of which was not recognised by either the United States or the British Government) coincided with the voyage of the *Quiros* and the express United States' claim to, *inter alia*, Sipadan and Ligitan, and it was one of the events leading to the 1907 Exchange of Notes. It was explained in the letter of the BNBC Chairman to the Foreign Office of 13 July 1903,[49] which contained a plea to the United States "to instruct their local officials to remove the flags and tablets they placed on islands which, notwithstanding anything else, have been under British jurisdiction for nearly a quarter of a century". The map accompanying the Chairman's letter of 1903[50] described the "red line" which later appeared on the map annexed to the 1907 Exchange of Notes.[51] There can be no doubt from this series of events that the 1903 Confirmation — and much more importantly, the 1907 Exchange of Notes — was considered as covering Ligitan and Sipadan.

C. Transactions between Britain (on behalf of North Borneo) and the United States

3.17. Evidently, if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900. Conversely, if Spain had such rights, or if its earlier claims to the Borneo islands beyond 9 nautical miles had been lost by reason of the BNBC's uncontested administration of the islands after 1878, then any possible claim of the Netherlands was already doomed to failure. Nothing that has happened since 1900 could possibly have *strengthened* a Dutch or Indonesian claim to the two islands. Neither the Netherlands nor Indonesia have ever administered the islands. Nor (prior to 1969) did either government protest at their administration as part of North Borneo and later Sabah. To that extent, it is possible for the Court to dismiss the Indonesian claim without considering the relations between the BNBC, Britain and the United States after 1900 so far as they concerned the two islands. In the first place, Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Bulungan, a valid claim to the islands before 1891, *and* (b) that the Netherlands retained sovereignty over them under the 1891 Boundary Convention.[52] In fact it can show neither, for the reasons already given, and its claim must accordingly fail.

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[48] IM, paras. 7.16, p.134 & Map 7.1 opposite p. 134. To similar effect, IM, para. 7.58, p.148.

[49] Annex MM 59, vol. 3.

[50] Malaysia has made extensive efforts to locate the 1903 map, without success. It appears to have gone missing from the relevant archive in the 1920s. There is however no doubt as to its effect, due to the annotation on the map accompanying the 1907 Exchange of Notes, which makes express reference to it.

[51] MM, Annexes, vol. 5, Map 6.

3.18. Nevertheless, the relations between the BNBC, Britain and the United States are significant for the present case, and Indonesia devotes considerable space to them in its Memorial.[53] From Malaysia's point of view they are significant for two reasons: (a) they provide excellent, detailed evidence of the continued actual administration of the islands from North Borneo; and (b) in the event, the title of Malaysia to sovereignty over the two islands arose as a result of those transactions, and specifically the Treaty of 1930. Correspondingly, Indonesia seeks to explain them away. In particular, three general issues are contested by Indonesia and require to be dealt with.

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[52] Although it is *necessary* for Indonesia to establish these two propositions, it is not *sufficient* for it to do so. Even if the Netherlands had maintained a claim to the two islands before 1891, and that claim had survived the Boundary Convention, it would in Malaysia's view have been lost as a result of the long-standing acquiescence of the Netherlands and Indonesia at British and Malaysian administration of the islands in the period from 1891 onwards. That administration was not carried on by agreement or license from the Netherlands, and thus constituted adverse possession.

[53] See IM, paras. 3.63-3.70, 7.30-7.61.

(i) The extent to which the United States succeeded to Spain under the Treaties of 1898 and 1900

3.19. It is common ground that the allocation lines laid down in the Treaty of Paris of 1898 did not include the North Borneo islands.[54] The deficiency was soon realised and addressed in the Treaty of 7 November 1900.[55] Indonesia argues that the Treaty of 1900 covered only Cagayan Sulú and Sibutú and their dependencies.[56] But this clearly misdescribes the 1900 Treaty, which applied "to any and all islands belonging to the Philippine Archipelago... *and particularly* to the islands of Cagayan Sulú and Sibutú and their dependencies"[57] (emphasis added). The intention of the 1900 Treaty was to mop up all the Spanish islands in the region which were not within the lines laid down in the Treaty of Paris. For example, it intended to cover the Turtle Islands, which were also administered by the BNBC and which were also not mentioned by name in the Treaty of 1900.

3.20. Indonesia cites Secretary Hay's letter of 3 April 1903 as showing that the US made no claim to other islands beyond Cagayan Sulú and Sibutú,[58] but again this is not what the document says. It correctly identifies Sibutu as "the most southwesterly of the Sulu group proper" but notes that there were other islands, not part of "the main Archipelago" which were also outside the 3 marine league line from the coasts of Borneo and therefore remained subject to Spain after 1885. After analysing the various 19th century treaties, it concluded that Spain was competent to, and did in fact, cede to the United States "the whole of the Sulu Archipelago up to three marine leagues of the mainland coasts of British North Borneo, with the exception of the three named islands of Balambangan, Banguey and Malawali". In referring to "the whole of the Sulu Archipelago" in this passage, Secretary Hay was using the phrase in a broad sense, as compared with "the Sulu group proper... the main Archipelago". He thus agreed with the view of the Secretary of the Navy that "the sovereignty of the United States covers all outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo, except the islands of Balambangan, Banguey and Malawali".[59] It was on this basis that the Navy's Hydrographic Office in June 1903 prepared the map "Northern Shore of Sibuko Bay", which clearly shows Danawan, Si Amil, Ligitan and Sipadan as "under the sovereignty of the United States of America".[60] Far from showing, as Indonesia argues, that Sipadan and Ligitan, not being part of the Sulu Archipelago, "could not have passed to the United States" under the Sole Article of the 1900 Treaty, the Hay letter shows precisely the contrary. And whatever definition might be given to the "Sulu Archipelago",[61] the United States did in fact claim all these islands, as the 1903 map shows.

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[54] For the Treaty of Paris see Annex MM 19, vol. 2, pp. 74-80. For a sketch map showing the effect of the 1898 line see MM, p. 57.

[55] For the Treaty of 1900 see Annex MM 21, vol. 2.

[56] See IM, paras. 7.32-7.33, p.140.

[57] Annex MM 21.

[58] IM, paras. 7.34-7.36, p. 141. The letter is at Annex IM 98, vol.3 ; also Annex MM 55, vol. 3. It is analysed in MM, para. 5.24, pp.43-45.

3.21. Even if the various islands had not passed under the 1900 Treaty (because they should not have been considered as part of the Philippine Archipelago even in the extended sense of the 1900 Treaty), the islands were not relinquished by the United States, which was the territorial successor to the Philippines and had all rights which Spain had as successor to the Sultan of Sulu. The Turtle Islands are not part of the Sulu or Philippine Archipelagos in geographical terms, yet they were clearly treated as coming within the scope of the Treaty of 1900, and they ended up as part of the Philippines. No islands in the vicinity were left to Spain, or became *terra nullius* in 1900. Moreover if the United States was to be considered as having relinquished the islands by the treaties of 1898 and 1900 (which it did not, as witness the voyage of the *Quiros*), the islands would not have accrued to the Netherlands. The only relevant later action by the Netherlands was the 1915 Agreement, which confirmed that Dutch territory ended at the east coast of Sebatik. By contrast the BNBC administered the islands, as did its successors in title. They, not the Netherlands, would have been the beneficiaries of any relinquishment or abandonment by the United States.

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[59] Ibid., p. 115 (underlining in original).

[60] See MM, Map Annex, Map 5.

[61] In fact the Treaty of 1900 did not use the phrase "Sulu Archipelago". Rather it referred to "any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III" of the Treaty of Paris.

(ii) The voyage of the Quiros and the 1907 Exchange of Notes

3.22. Of course there was no relinquishment, but a vigorous assertion of legal title on the part of the United States, which was rapidly accepted and acknowledged by Great Britain. Faced with this, all that Indonesia can say is that "[t]he United States therefore mistakenly claimed sovereignty over certain islands outside the three-league limit from the coast of British North Borneo".[62] The term "mistakenly" is not explained. The United States acted on a considered and entirely defensible view of the legal position resulting from the Treaty of 1900, and the only other State claiming an interest in the matter, Great Britain, immediately agreed with its view.[63] The two States then took action, completed in 1907, to formalise the administrative status quo. As Malaysia showed in its Memorial,[64] these actions were made public at the time and elicited no protest from the Netherlands. It is true that Britain and the United States did not "evoke – as relevant to the discussions – the 1891 Convention".[65] There was absolutely no reason why they should have done, and if the Netherlands had thought the Convention relevant to the events occurring well to the east of Sebatik, it should have said so. But it remained silent.

3.23. As to the voyage of the *Quiros*, Indonesia is evasive. It accepts that Lt. Boughter landed on and claimed Sipadan for the United States, but suggests that there is no record of him actually stopping on Ligitan.[66] Even if that may be true, the *Quiros* clearly included Ligitan in the scope of its inquiries and described it in some detail: it was expressly included in the United States claim, as shown by the log of the *Quiros* and the 1903 Hydrographic Office map.

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[62] IM, para. 7.39, p.142.

[63] Indonesia states that "[e]ventually, the British Government came around to the U.S. position…", referring to a British Memorandum of 10 March 1905 (Annex IM 109, vol 3). The Memorandum, however, makes it clear that Great Britain recognised the validity of the US position "in the summer of 1903", i.e. immediately following the voyage of the *Quiros*. There was nothing eventual about it.

[64] MM, para. 5.41, p. 56.

[65] IM, para. 7.43, p. 144.

[66] IM, para. 7.40, p.142.

Indonesia also admits that the BNBC "was informed of the Quiros' visit to the Turtle islands and other islands off the port of Sandakhan [sic] and protested..."[67] But of course the BNBC was informed about the visit to the islands around Darvel Bay, including Sipadan, and protested those as well.[68] The fact of the BNBC's actual possession of the islands was disputed neither by Great Britain nor the United States (and it is evident from the log of the *Quiros* itself[69]). What was disputed was its having acquired sovereignty over islands beyond the nine mile line, and on that point Britain sided with the United States, not the BNBC. It is not for Indonesia now to assert that the views of the relevant actors were "mistaken".

3.24. Indonesia has little to say about the 1907 Exchange of Notes itself, which is rather surprising given the clear purport of the annexed map[70] (especially when it is read against the Hydrographic Office map of 1903[71]). Indonesia makes only two points:

- First, it seeks to set against the 1903 and 1907 maps a large scale 1902 map of the Philippines, which was tendered by the United States in evidence in the *Island of Palmas* case as showing the extent of the Philippines administrative departments in that year.[72] It is far from clear what is to be drawn from the 1902 United States map. Neither the Turtle islands nor the Darvel Bay islands beyond 9 n.m. from the coast are shown as falling within the Department of South Philippines, but that is hardly surprising. In 1902 those islands were administered as of right by the BNBC, and had been for some years. It was only later that it seems to have occurred to the United States that it had a claim to additional Bornean islands beyond the 9 n.m. line. The Secretary of the Navy only raised that issue with the Secretary of State on 14 March 1903.[73] But whatever the purport of the 1902 map, it cannot be considered as affecting the actual transactions of the period 1903-1907, in particular the Exchange of Notes and its annexed, agreed, map.

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[67] IM, para. 7.44, p. 144.

[68] See MM, paras. 5.30 & 5.31, pp. 48-49 with references to relevant BNBC protests.

[69] See MM, paras. 5.27-5.29, pp. 47-48, Annex MM 63, vol. 3.

[70] MM, Annexes, vol. 5, Map 6.

[71] MM, Annexes, vol. 5, Map 5.

[72] IM, para. 7.46, p.145; the map is in IM, Map Atlas, Map 8.

[73] See Annex MM 55, vol. 3.

- Secondly, Indonesia stresses the provisional character of the 1907 arrangement, and asserts that "any ambiguity concerning the division of the territorial possessions of Great Britain and the United States was definitively settled" by the 1930 Convention.[74] But the 1907 Exchange of Notes is not to be ignored because it was later replaced by a different and more permanent territorial settlement. It showed, definitively, that the affected islands were administered by the BNBC; it permitted them to continue to be so administered. It resolved doubts about sovereignty over those islands (even though precisely which islands fell within the 9 n.m. line remained uncertain). Its publication called for a protest by the Dutch, if they had claimed islands affected by it. And it provides an essential basis by which the final disposition of the islands in 1930 is to be understood. In all these respects it supports Malaysia's claim to the islands.

(iii) The 1930 Boundary Convention between the United States and Great Britain

3.25. Finally there is the 1930 Convention itself.[75] Read in its own terms, and against the background of the transactions of 1903-1907, the Hydrographic Office Map of 1903 and the agreed map of 1907, its effect is perfectly clear. It specified in Article III that "all islands to the south and west of the said line shall belong to the State of North Borneo". Sipadan, Ligitan, Danawan, Si Amil and Mabul (all lying outside 9 n.m. from the coast of Borneo) were plainly affected by it. It is true, as Indonesia notes, that the southern-most point on the 1930 line is well north of 4°10'.[76] But this is because there were no islands the United States wished to retain which fell south or west of the 1930 line. If "there was no question of any possible claim of the United States to the islands in issue in this case",[77] this was because those islands, previously administered under license pursuant to the 1907 Exchange of Notes, were relinquished to North Borneo. In 1903, as we have seen, there was a clear and explicit claim by the United States to those very islands.

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[74] IM, paras. 7.50-7.51, p.146.

[75] See Annex MM 29, vol. 2 and MM, paras. 5.43-5.44, pp. 56-58.

[76] IM, para. 7.55, p. 147.

[77] Ibid.

3.26. The effect of the 1930 line was well understood at the time. In an Admiralty memorandum of July 1927, the contemporary legal situation was analysed, so far as relevant, in the following terms: "under a strict application of the Madrid Protocol [of 1885], such islands as Mantabuan, Puan, Boheian and the Ligitan Group would fall to America, while if such 'contiguous' islands as Bum-Bum are accepted as the base of the 9 mile zone, the boundary would be extended eastward to include Puan within British territory, while such islands as Boheian and the Ligitan group would be of doubtful ownership (as Pulo Gaia would be in the previous case), the boundary of the 9 mile zone passing through them"[78]. The negotiators of the 1930 Convention sought to resolve such ambiguities, with the United States insisting on Great Bakkungaan and the Turtle Islands, and leaving the smaller North Borneo islands (including Sipadan and Ligitan) to Britain. It is significant that the author of the 1927 memorandum was in no doubt on two points: (a) that the sovereignty over such islands as the Ligitan group was at stake; and (b) that the only relevant parties were the United States and Great Britain: "any territory which cannot be shown to be British is definitely American".[79] Subsequently, the Admiralty noted the effect of the actual line proposed for the 1930 Convention, in the following terms:

> "Even taking that interpretation of the 9 mile limit which is most advantageous to the British North Borneo Company, the balance of gain and loss involved in accepting this line would be as follows:-
>
> The United States would receive Great Bakkungaan Island, which may be claimed as belonging to British North Borneo,
>
> but
>
> British North Borneo would receive Buaning, Lankayan, Mantabuan, Mataking and Ligitan Islands, to none of which she has any valid claim."[80]

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[78] See Annex IM 123, vol. 4.

[79] Ibid. at p. 51. It may be noted that the chart cuttings used to illustrate the 1927 Admiralty memorandum show the 1891 boundary stopping at the east coast of Sebatik.

[80] See vol. 2, MCM Annex 3.

3.27. In the light of these contemporary views, Indonesia's modern sketch map illustrating the effect of the 1930 Convention is, again, purely conclusory.[81] Its Map 7.3 shows the 1930 line and what is described as the "1891 Convention line", reaching as far as 119°E. But there was of course no 1891 Convention line eastwards of Sebatik; there was only a line on a Dutch internal map, not opposable to the United Kingdom and (as far as appears) completely unknown to the United States. Moreover the line on the Dutch internal map is considerably shorter than that shown on Map 7.3; if Indonesia wishes to continue the 4°10' N line in an easterly direction across the sea, it is far from clear why it should stop at 119°E, just after Ligitan. Such a line is a pure *post hoc* construct, which formed no part of the intentions of the parties to the 1930 Convention (any more than it did for Britain and the Netherlands when they concluded the 1891 Convention).

3.28. The point may be tested in the following way. If Indonesia is right, what are the consequences for the group of five islands (Kapalai, Danawan, Si Amil, Ligitan and Sipadan) which lie to the south of the 1930 Convention line, but more than 9 n.m. from the coast of Borneo? According to Indonesia, the United States had no claim to any of those islands, and did not intend to transfer sovereignty over them to North Borneo. It would follow, apparently, that Kapalai, Danawan and Si Amil were left as *terra nullius*. But if those three, why not Ligitan and Sipadan? The United States had no knowledge of the internal Dutch map, and no intention to cede any islands to the Netherlands in a Convention to which the Netherlands was not a party. There is no basis in the 1930 Convention for distinguishing three of these islands from the other two. The Indonesian claim lacks all logical and legal foundation.

D. Conclusion

3.29. Indonesia's arguments in Chapter 7 as to the effect of the various transactions between the BNBC and Britain, on the one hand, and Sulu, Spain and the United States, on the other hand, depend in the final analysis upon the proposition that the territory of Bulungan in 1890 extended to the islands off the coast of the Semporna peninsula, including Sipadan and Ligitan. There is absolutely no evidence that any of the actors at the time considered that possibility. The Dutch claim which led to the 1891 Convention repeatedly made it clear that Batu Tinagat was "the extreme easternmost point" of its claim.[82] Nor is there the slightest evidence of any actual Bulungan or Dutch administration of the two islands, or of any other islands in the vicinity, before 1891. This is not just the familiar question[83] which of two States has shown more evidence of administrative and other acts affecting a particular territory or island. There is no evidence whatever of *any* administrative act by the Netherlands at any time prior to 1903, affecting these islands, or of *any* claim or intention on the part of the Netherlands to acquire them. In the absence of such evidence Indonesia's case lacks a coherent basis. If the Netherlands did not already hold the two islands in 1890, the 1891 Boundary Convention must be irrelevant. Britain could not have ceded to the Netherlands in 1891 islands which (Indonesia agrees) were not part of the territory covered by the Sultan's grant of 1878, recognised by Spain as belonging to North Borneo in the Protocol of 1885. But if the Netherlands did not hold the islands in 1890, how could it have acquired them since? It exercised no administration over the islands after 1891, and made no new claim to them. By contrast the transactions between Britain and the United States in 1907 and 1930 show a clear intention to cover all the offshore islands beyond 3 nautical miles and to resolve all outstanding issues. The criterion applied was simple. Before 1930, the position was that "the mainland of British North Borneo and a certain number of islands are British, and any territory which cannot be shown to be British is definitely American".[84] In 1930, the United States ceded to Britain "all islands to the south and west" of the line described in Article I of the Boundary Treaty. Sipadan and Ligitan, which had previously been claimed by the United States, lie to the south and west of that line. The United States' claim to the islands, acknowledged as justified by

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[81] IM, Map 7.3, opposite page 147.

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[82] See the note of Dutch Foreign Minister Hartsen to Count Bylandt, dated 22 December 1888, communicated to the Marquess of Salisbury on 3 January 1889: IM, Annex 37, vol. 2, p. 327. Hartsen repeatedly referred to Batu Tinagat as "[le] point extrême à l'est", so far as the Dutch claim was concerned. Mr. Hartsen's note is quoted and discussed fully by Sir Edward Hertslet in his Further Memorandum of 9 January 1889: Annex MM 43, vol. 3.

[83] Cf. the *Minquiers & Ecrehos* case ICJ Reports 1953 p. 47.

[84] See the confidential Admiralty Memorandum, "Boundary between British North Borneo and the Philippines", July 1927, p. 1: Public Record Office, FO 371/12050; Annex IM 123, vol. 4.

Great Britain in the period 1903-1907, was thereby resolved. In continuing to administer the islands after 1930 (to the exclusion of any other claimant), the BNBC and its successors united sovereignty and administration. Nothing said in Indonesia's Memorial as to these transactions casts any doubt on this conclusion.

Chapter 4

THE PRACTICE OF THE PARTIES AND THEIR PREDECESSORS CONFIRMS MALAYSIA'S TITLE

A. Introduction

4.1. Malaysia has demonstrated, in its Memorial, continual peaceful administration of the islands, since time immemorial and certainly since the end of the 19th Century, by the Sultanate of Sulu, the BNBC, Britain and Malaysia.[1] It has also demonstrated Dutch and Indonesian inactivity during that period.[2] The present Chapter will focus on practice of the parties and their predecessors in the area, and on possession and administration of the two islands of Ligitan and Sipadan, in response to the arguments put forward in the Indonesian Memorial.

B. Practice relating to the Islands before 1963

4.2. In discussing practice in the pre-independence period, five points need to be mentioned. They are, firstly, the relations between the Netherlands and the Sultanate of Bulungan; secondly, the scope and purpose of Dutch and British naval activities in the region; thirdly, Dutch deliberations on a maritime boundary east of Sebatik in the 1920s, fourthly, the actual administration of the islands, and fifthly, Indonesia's own maritime boundary proclamation of 1960.

(i) Relations between the Netherlands and the Sultanate of Bulungan

4.3. So far as Malaysia has been able to discover from an extensive review of the documents and literature, there is no trace whatsoever of any activity of the Sultan of Bulungan on the two islands. Certainly Indonesia produces none. The islands were far away from

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[1] MM, Chapter 6.

[2] Ibid., Chapter 7.

Bulungan, and from any area the Sultan of Bulungan can be shown to have controlled. The Sultanate was a small land-based entity, with no maritime activities worth mentioning. On the other hand, the Sultanate of Sulu was a maritime State. Its mainland possessions were annexes of the Sulu archipelago. The Bajaus, who in effect had a monopoly on the adjacent islands, considered themselves and were considered by others as under Sulu authority.

4.4. The Sultanate of Bulungan was in fact a rather weak political entity and a tiny one compared with the Sultanates of Sulu and Brunei. Contrary to what Indonesia asserts in Chapters III and IV of its Memorial, the successive Sultans of Bulungan did not manage to exercise real power even within their dominion on land, let alone in maritime areas. The limited power of the Sultans of Bulungan is described in the annexed report by Professor Houben, an internationally recognised expert on the region.[3]

4.5. During the nineteenth century the Dutch concluded various contracts with the Sultan of Bulungan, although throughout most of the nineteenth century they pursued a policy of abstention with regard to Borneo. As documented in Professor Houben's report, the Dutch interference with Bulungan was cursory, and mainly meant to assert their territorial claims on the mainland of Borneo vis-à-vis the British. Apart from piracy patrols and attempts to suppress the slave trade, they took no particular interest in the sea areas of north-eastern Borneo. Bulungan, for its part, was not a naval power and had not even the capacity to do so. Trade with Bulungan was carried in foreign ships, especially Sulu praus.[4]

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[3] See below, Appendix 1, Prof.dr.V.J.H. Houben, "The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)".

[4] Hageman reports that Bulungan and Tidung had no praus of their own: J. Hageman, "Aanteekeningen omtrent een gedeelte der Oostkust van Borneo", in *Tijdschrift van de Indische Taal-, Land- en Volkenkunde*, vol. 4 (1855), pp. 71-106 at p. 78.

(ii) Naval activities by Great Britain and the Netherlands

4.6. The first activities of the colonising powers were naval activities: surveys and attempts to impose a minimum public order. Sipadan and Ligitan were part of the islands included in the Darvel Bay group. The islands were surveyed by Great Britain. The *Egeria* cruise in 1891 is one of the first documents mentioning the islands. As demonstrated above, it was an exclusively British activity, part of the Darvel Bay survey.[5]

4.7. Of the many hundreds of islands along the east coast of Borneo, only a minority have permanent settlements. Given the limited resources available, the colonial powers were more intent on collaboration than on affirmation of respective sovereignties on these small and often featureless islands, as the HNLMS *Macasser* cruise shows.[6] Commander van Straaten's report focuses principally on the exact location of Gusungan Island, estimated at 4° 18' 55" N, much further north than the 4° 10' N parallel and chosen as the third point for his survey. He rejected Sipadan as too far out at sea for reliable measurements. The Dutch navy had no qualms about sailing in British waters and the British authorities did not complain. Collaboration was necessary for a complete survey of the coast to establish reliable navigation charts, and relations between the officers were good.

4.8. Collaboration was also necessary to control banditry and the slave trade. It is in that perspective that one must appreciate the only Dutch activity mentioned by Indonesia to support its claim to the islands: the incident of the *Lynx* in 1921. The Indonesian Memorial examines the incident under the title "Activities of the Netherlands and Indonesia with Respect to the Islands. A. Dutch Activities". It says:

> "A highly relevant example of such a practice following the 1891 Convention is provided by the policing

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[5] See above, paragraphs 2.29-2.42.

[6] Annex MM 64, vol. 3. Annex IM 105, vol. 3, translates a different part of the report, but is not contradictory.

> activities carried out in the area by ships of the Royal Netherlands Navy ...A report by the commanding officer ... provides a detailed account of one such expedition."[7]

The problem is that it is not an example but the sole instance. Moreover as an incident it proves nothing.

4.9. The *Lynx* incident certainly did not amount to a claim of sovereignty on Pulau Sipadan. No flag was hoisted, no tablets were fixed, unlike the cruise of the *Quiros* nearly twenty years earlier. There was no reason for the British authorities to protest or even to complain. Quite to the contrary, as the Dutch navy was giving a helping hand in policing the pirate-infested waters.

(iii) Internal Dutch deliberations on a maritime boundary east of Sebatik

4.10. To judge from its Memorial, Indonesia is not aware of the well-documented internal Dutch deliberation during the 1920s of a maritime boundary east of Sebatik, in the period subsequent to the voyage of the *Lynx*.[8] It shows that the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Boundary Convention.

4.11. In a letter dated 9 August 1922 to the Governor-General of the Netherlands East Indies, the Vice-Admiral of the Netherlands-Indies suggested three options for the boundary line delimiting the Dutch and British territorial waters east of Sebatik.[9] He included a sketch map with calculations of the course of the boundary for these options:

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[7] IM, para. 6.2, p. 101.

[8] See MM, para. 7.15-7.16, pp.81-82; and cf. IM, paras. 6.2-6.5, pp.101-103.

[9] Fully reported by the Governor-General of the Netherlands East Indies to the Minister of Colonies, 10 December 1922 (translated from Dutch): see vol. 2, Annex MCM 4, pp. 19-25.

the original map, and a clearer version with text in English, are included here as Inserts 5 and 6, on the following two pages.

4.12. According to the Vice-Admiral, the three options were:

> "a) a line which is an extension of the land boundary (AB on the map);
>
> b) a line perpendicular to the coastal line at the boundary point on the beach (AD on the map);
>
> c) a line from the boundary point on the beach to the point of intersection of the territorial waters of the Netherlands East Indies and British North Borneo (AC on the map)."

In his view, option *b)* would make the most sense. The Governor-General concurred:

> "...the coastal waters being recognised as state territory, not least for defence at sea, it would hence be absurd to take the — merely accidental — last course of the land boundary as the determining factor for the maritime boundary, and subsequently, as demonstrated by this case, to leave the possibility open that an area of foreign maritime waters is located in front of the land area of another state."[10]

The 4° 10' N line would have exactly this cut-off effect. Thus in terms as plain as could be, one of the highest marine officers of the Netherlands East Indies expressed the view (a) that a maritime boundary had not been established as at 1922; (b) that one should be established, and (c) that it should be of limited length only. Not a single reference was made to the island of Sipadan, just visited by the *Lynx*, let alone to Ligitan or to the waters surrounding these two islands. As the Indonesian Memorial points out,[11] the Commander of Naval Forces Netherlands East Indies had been fully informed by the Commander of the *Lynx* of the cruise on 4 January 1922.

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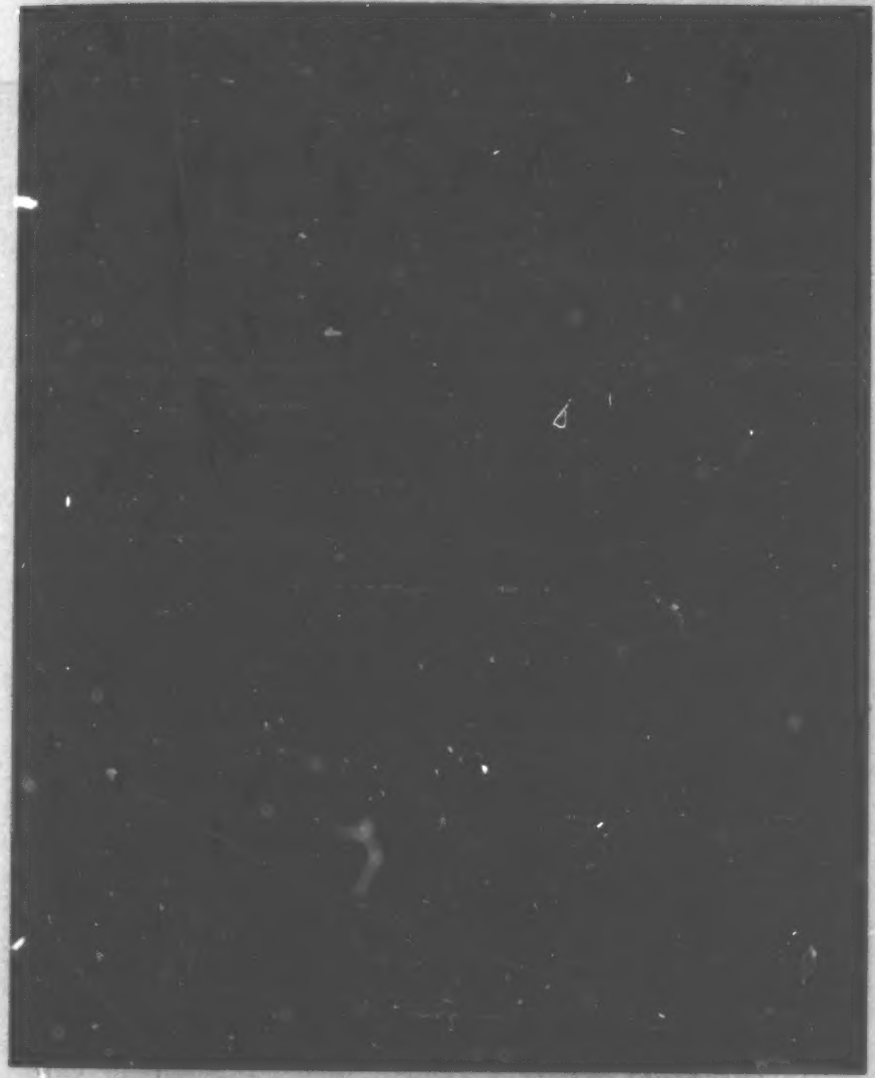
[10] Ibid. (translated from Dutch).

[11] IM, para. 6.3, p. 101.

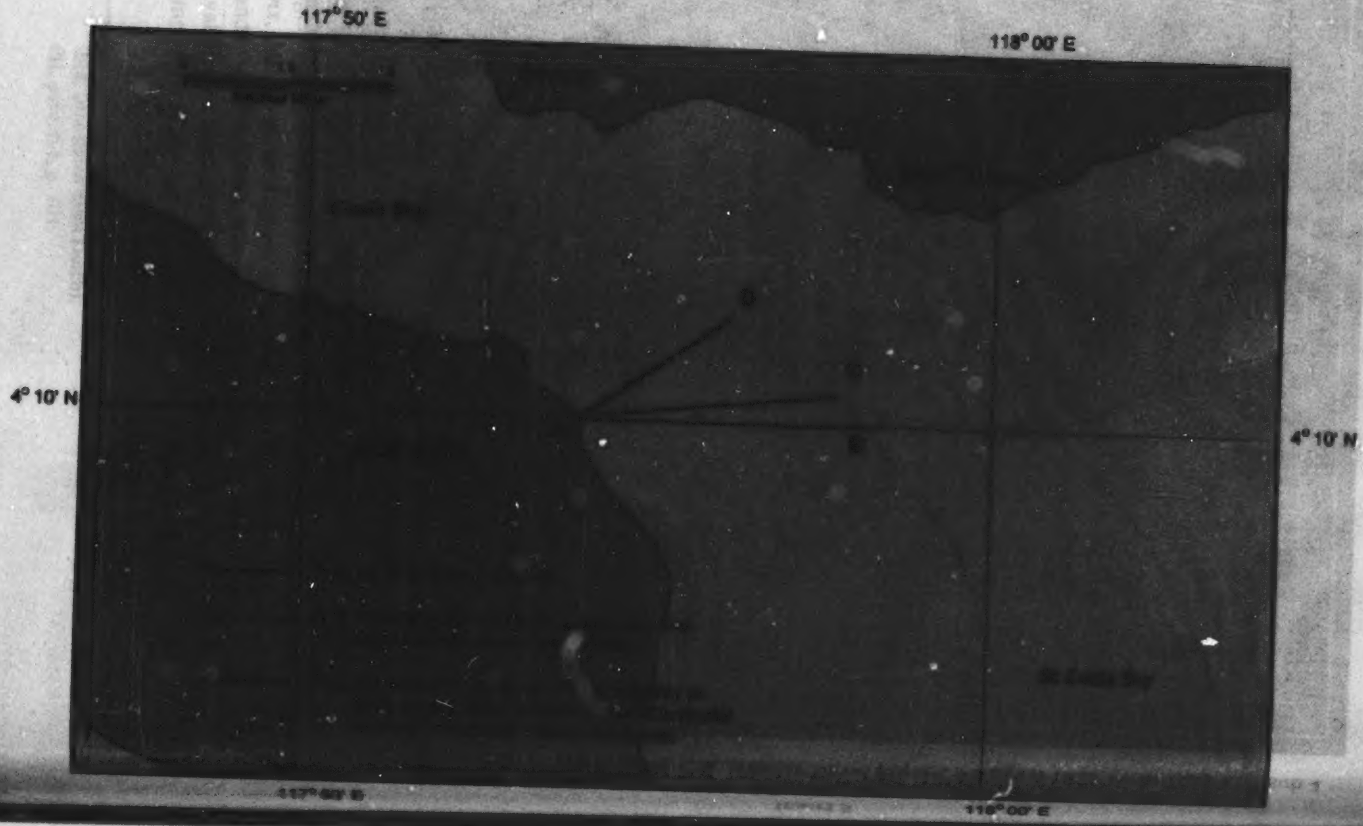


Insert 5

Boundary Lines referred to in letter Commander Naval Forces, 9 August 1922 Verb. 7234 VIII sub 4

Insert 6

Boundary Lines referred to in letter Commander Naval Forces, 9 August 1922


117° 50′ E
118° 00′ E
4° 10′ N
4° 10′ N
117° 50′ E
118° 00′ E

4.13. In a memorandum submitted by the Legal Department of the Netherlands' Ministry of Foreign Affairs, dated 8 August 1923, the Head of the Department advised the Minister of Colonies to maintain the continuation of the land boundary.[12] He gave a number of reasons, including:

(1) The adoption of the 1891 Convention relating to the division of Sebatik along the 4° 10' N. parallel, as elaborated in the Explanatory Memorandum to Parliament: "By this division of the island both the Netherlands and British North-Borneo will have that area of the island in possession which forms the shore of the waterway along which each has to reach the coastal area allocated to them; this is fair and rational";

(2) The map accompanying the Explanatory Memorandum on which the boundary is continued into the sea along the 4° 10' N. parallel: "As far as I could ascertain, this map does not result from actual consultation between the Netherlands and England; however, I view it as not impossible that that map is known to the British Government."

These two circumstances were not, in his view…

> "of such a nature that, should very significant Dutch interests be damaged by a delimitation of Dutch territorial waters east of Sibetik along the parallel of 4° 10' N., an attempt should not be ventured to seek recognition from the British Government for a delimitation of the territorial waters along the perpendicular line, erected at the eastern coastal boundary point of Sibetik at sea. However, so far, it does not appear that such great Dutch interests are at stake as to risk a possible rebuff from the British Government."

4.14. Like the Vice-Admiral, the Head of the Legal Department evidently did not regard the 4° 10' N. line as an established maritime boundary. Nor was it opposable to Britain. But he was concerned that it might provide the British with an argument in favour of a maritime boundary (continuing the land boundary) which cut off the Dutch coast of Sebatik. At the same time he confirmed that the reason for the 4° 10' N line was to provide access by sea to the respective coastal areas to the west and north west of Sebatik.

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[12] Ministry of Foreign Affairs, Legal Department, No. 1252/7634, 8 August 1923 (translated from Dutch). The full text plus translation is set out in vol. 2, Annex MCM 5.

4.15. Thereupon, at the request of the Dutch Minister of Colonies, the Governor-General of the Netherlands East Indies consulted a wide circle of authorities in the Netherlands East Indies on the issue, including the Resident of the South and Eastern Division of Borneo, the Directors of Public Works and Home Affairs and the Head of the Naval Department. All concluded that no particular Dutch interests would be at stake in establishing a territorial sea boundary different to the line of the land boundary, since among other reasons, in "this particular area there are no islands; only the open sea".[13] Nevertheless, Vice-Admiral Gooszen emphasized that it would be necessary to determine a maritime boundary "which currently is still undetermined and subject to different views."[14] In a letter of 5 April 1924, the Governor-General of the Netherlands East Indies transmitted all these memoranda to the Minister of Colonies and stated that the Council of the Netherlands East Indies and he were of the view that "no particular Dutch interests would be violated by extending the land boundary but that determination of a boundary, whatever it would be, would be necessary".[15] On 13 May 1924 the Minister of Colonies sent all relevant documents to his counterpart in Foreign Affairs and requested him to reconsider this matter.

4.16. After further consultation, the Minister of Foreign Affairs finally advised the Minister of Colonial Affairs on 27 September 1926:

> "...I cannot recommend raising with the British Government the matter of the boundary between the Dutch and British territorial waters on the Eastern coast of the island of SIBETIK, because I do not consider it

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[13] See MM, para 7.16, p. 82.

[14] See vol. 2, Annex MCM 6 (emphasis in original; translated from Dutch).

[15] Text in ARA, *Min. van Kol.*, 2.10.36.04, inv. No. 2637, no. 11. Translated from Dutch.

> desirable to raise a question without reason and it does not appear that the British Government would object to the perpendicular line on the coast as the boundary line in this area. As this is the most evident solution, it seems not unlikely to me that the British Government itself will subscribe to it. The fact that this solution is in accordance with the principles of international law most adhered to, derives in my view from the recognition of the right to territorial waters in general, namely the desirability that the water in FRONT of the coast falls under the same agreement as the coast. In the case of deviation from the perpendicular line, no justice is given to this principle. However, a fully definitive rule in international law cannot be given."[16]

4.17. The final conclusion of the Dutch Minister of Colonies, in October 1926, is therefore that a fixing of the boundary line between the Dutch and British territorial waters is not urgent: "The matter can hence be left in abeyance."[17] No further deliberations on the maritime boundary took place until the Dutch transferred sovereignty to Indonesia after the Second World War.

4.18. In sum, notwithstanding extensive internal Dutch deliberation during the 1920s among a large number of Dutch officials in The Hague and in the Netherlands East Indies on the maritime boundary in the area, a carefully considered decision was taken by the Dutch ministers of Colonial Affairs and Foreign Affairs in 1926 not to raise the matter of a maritime boundary with Great Britain. It was assumed that the perpendicular line would apply, and this was indeed in accordance with the prevailing law of the sea at that time. The sketch maps show that the Dutch were well aware of the fact that such a maritime boundary would only be of limited length and would not extend in the direction of the islands of Sipadan and Ligitan.

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[16] See vol. 2, Annex MCM 7 (translated from Dutch).

[17] See Decision of the Minister of Colonies, 2 October 1926, in ARA, *Min. van Kol.*, 2.10.36.04, inv. No. 2877, no. 41/1191: vol. 2, Annex MCM 8 (translated from Dutch).

(iv) British administration of the islands

4.19. The principal economic activity on Sipadan for the colonial period was the collection of turtle eggs. Turtle eggs were a precious commodity. The island was famous for its turtle. The activity was a monopoly of the Danawan people. The concession derived from the Sultan of Sulu and was inherited under local custom by successive headmen of Danawan. The nature of the activity and the various steps taken by the British administration to regulate that activity are summed up in the Malaysian Memorial, vol. 1, pp. 65-69. Not a single equivalent act is cited by Indonesia.

4.20. The Indonesian Memorial does however draw attention to the Turtle Preservation Ordinance of 1 June 1917. It notes the following:

> "Significantly, Section 3 of the Ordinance specifically excluded from this licensing régime areas deemed to be "native reserves", i.e., areas within which the collection of turtle eggs was reserved to natives only..... As such, the island of Sipadan was not deemed as falling within the territory which was considered to be part of the State of North Borneo for the purposes of this Ordinance."[18]

4.21. The Indonesian interpretation of the 1917 Ordinance is farfetched, indeed extraordinary. The Ordinance very specifically concerns the territory of North Borneo and only its territory.[19] Section 2 provides:

> "2. (i) No person shall search for, capture or destroy turtles or search for or collect turtle eggs within the State or the territorial waters thereof unless he shall have obtained a licence in such behalf in a manner prescribed hereunder."

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[18] IM, para. 3.71, p. 31.

[19] Annex MM 97, vol. 4.

Section 3 provides:

> "3. The areas specified by the Governor from time to time in Schedule C shall be deemed to be native reserves for the collection of turtle eggs, and nothing contained in this Ordinance shall be deemed to affect the collection of turtle eggs by natives therein, and no license or concession granted hereunder shall be deemed to include such areas: provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry."

Schedule C specifies as Native Reserves for the purposes of section 3...

> "All that area from Nosong Point in Kimanis Bay to Jesselton, including Pulau Tiga and Gaya Island.
>
> Sipadan Island.
>
> Kudat District, including the islands therein."

4.22. The text of the Ordinance is quite clear. It applies to "the State and territorial waters thereof". Native reserves are under a special régime, for well understood reasons. The British authorities did not want to interfere with traditional Bajau activities. And they certainly wanted to avoid confrontation between Bajaus and other potential turtle egg collectors. Under the Ordinance it was an offence for anyone not a native resident of North Borneo to collect turtle eggs on Sipadan. But even the natives were potentially subject to regulation under the Ordinance in their activities on the island, since the Governor was authorised to make "rules for the protection of the industry". Moreover, as is shown in the Malaysian Memorial, disputes over turtle egg collection on Sipadan were resolved by the BNBC Administration, first as based in Lahad Dahu, later in Semporna. The Ordinance is a clear manifestation of BNBC authority over Sipadan. The island is specifically designated as lying within the territory of North Borneo and is singled out for a special administrative régime. The Netherlands authorities did not react to the duly published Ordinance.

4.23. Sipadan was also declared a bird sanctuary on 1st February 1933, following a proposal by the conservator of forests of Sandakan, implementing article 28 of the Land Ordinance 1928. Sipadan became a megapode preserve.[20] Again, the Netherlands did not react to the publication in the Official Gazette. The sanctuary was renewed by Ordinance No. 11 of 28 June 1963.[21] Indonesia did not react any more than the Netherlands had done in 1917.

4.24. Lighthouses were constructed and maintained on Sipadan and Ligitan during the colonial period. The Malaysian Memorial gives full details on this point.[22]

(v) Maritime delimitation by Indonesia: Act No. 4 of 1960

4.25. Act No. 4 concerning Indonesian Waters, promulgated by the President of the Republic of Indonesia on 18 February 1960, is an important element of the practice of the Parties. It is one of the founding acts of Indonesian sovereignty. Promulgated before the formation of Malaysia (vide the Malaysia Act, 1963), it partakes of the definition of *uti possidetis* so far as Indonesia is concerned.

4.26. The *Djuanda Declaration*, issued by the Government on 13 December 1957, formulated the Nusantara concept. The Indonesian Government announced its decision to extend the breadth of its territorial waters to 12 nautical miles. It further declared that:

> "... all waters around, between and connecting the islands or parts of islands, that make up the landmass of the Indonesian Republic, disregarding their breadth, are true parts of the regional area of the Republic of Indonesia and therefore are parts of the internal or

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[20] MM, para. 6.24, p. 69.
[21] See vol. 2, Annex MCM 9.
[22] MM, paras. 6.25-6.29, pp. 69-70.

national territorial waters under the absolute sovereignty of the State of the Republic of Indonesia."[23]

4.27. Three years later, Act No. 4 of 18 February 1960 enacted the Djuanda Declaration. It defined the outer limits of the Indonesian national waters by a list of baseline coordinates.[24] The Indonesian baselines for Kalimantan start at the east coast of Sebatik Island at the point determined by the 1891 Boundary Convention, i.e. 4° 10' N., 117° 53.7' E., point 36, denominated Tg. (tanjung) Saima in the Act. The line then runs southward to a point 4° 7.6' N., 117° 55.3' E., point 36A on Sebatik Island. It then runs due south to point 36B at 4° 3.7' N., 117° 55.5' E. It then joins point 37 at 3° 28.5' N., 117° 52.5' E. at Tg. Arang.

4.28. The Map attached to Act No. 4 confirms that the base line runs due south from Sebatik Island, and this can be seen very clearly from Insert 7, page 85, an enlargement of the relevant section of the Indonesian map.[25] When Indonesia was determined to extend its territorial sovereignty to "the outermost points of the outermost islands" (Section 1.2 of Act No. 4) — a considered decision on its part which triggered a major international debate on the issue — the baseline thus proclaimed stayed clear of Sipadan and Ligitan.

4.29. Act No. 4 was reiterated as Indonesia's international stance on its territory many times and solemnly. It was referred to in Indonesia's reservation attached to the ratification of the 1958 Geneva Convention on the High Seas. It was referred to in the Indonesian Declaration on the Continental Shelf of 17 February 1969; in the subsequent Act Concerning the Continental Shelf of 6 January 1973; in the Declaration Concerning the Exclusive Economic Zone of 21 March 1980, and in the Act Concerning the Exclusive Economic Zone of 18 October 1983.

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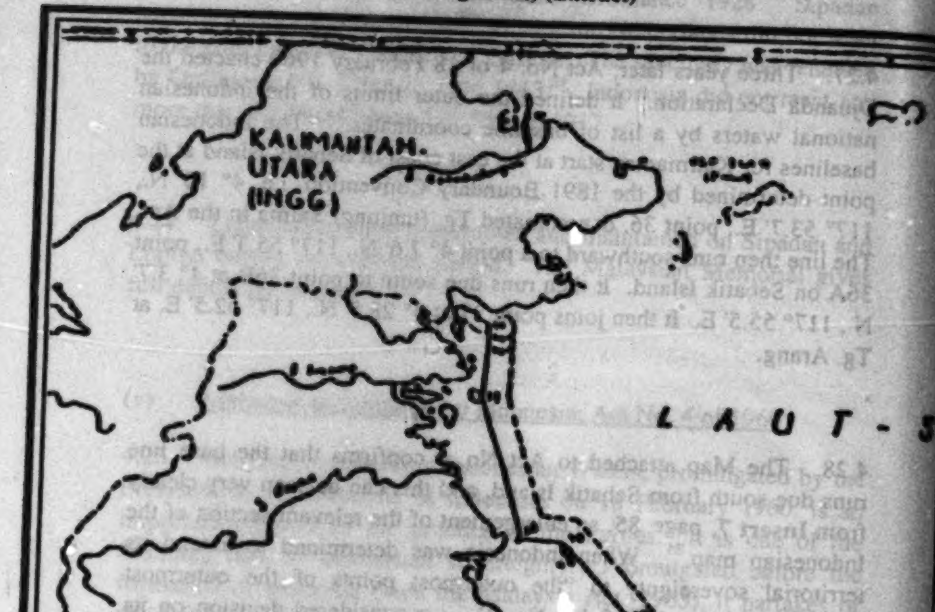
[23] Mochtar Kusumaatmadja, *The Concept of the Indonesian Achipelago*, The Indonesian Quarterly, vol. X, no. 4, October 1982, pp. 12-26 at p. 13.

[24] Annex MM 107, vol. 4.

[25] Annex MM vol. 5, Map 7.

Insert 7

Map annexed to Indonesian Act No. 4 of 1960 (Enlargement) (Extract)


KALIMANTAN. UTARA (INGG)
L A U T - S
T A H
T E L U
SULAWESI

4.30. Act No. 4 was an important element in assessing the situation of *uti possidetis* in 1963 when Sabah became independent and joined the Federation of Malaysia. Indonesia correctly points out that the existence of territorial title "must be analysed at the time when each country attained independence (as per the principle of *uti possidetis juris*) – another key date in all territorial disputes between States which have had a colonial past –in order to establish what the prevailing situation was at the time".[26] On 16 September 1963, the State of Sabah, as a new member of Malaysia, could rely on a territory determined by the principle of *uti possidetis*.

4.31. The situation in 1963 was very clear as to sovereignty over Sipadan and Ligitan. The islands had been clearly identified at the turn of the century, in particular by the *Quiros* expedition. They had been ceded by the United States to Great Britain by the Treaty of 2 January 1930. British administration had been peaceful and unchallenged all through the period as a result, in particular, of the exchange of letters with the United States of 1907. The Netherlands never tried to assert their sovereignty on the two islands. It confirmed in 1915 that the delimitation of Dutch possessions with British North Borneo stopped at Sebatik Island and did not continue out into the open sea. It never voiced a concern, even less a protest, at the numerous and public British acts of administration. Indonesia followed the same policy and accepted British administration of the islands. Three years before Sabah independence, the Indonesian Government, by a solemn act, Act No. 4 of 1960, published baselines which clearly excluded Sipadan and Ligitan from Indonesian territory. The implications of *uti possidetis juris* could not be more clear.

C. Post-colonial practice

4.32. Does post-colonial practice tell any different story? Or, more exactly, does post-colonial practice establish an agreement between the Parties to modify the boundary as it stood at the date of their respective independence?

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[26] IM, para. 8.27, p. 160.

4.33. For the first 25 years of its independence, Indonesia showed no interest in Sipadan and Ligitan. It did not manifest any presence in the area, did not try to administer the islands, enacted no legislation and made no ordinances or regulations concerning the two islands or their surrounding waters. To Malaysia's knowledge, Act No. 4 is the first piece of legislation specifically mentioning the area beyond Sebatik by extending the territorial waters to 12 nm off the eastern coast: as noted, that Act specifically did not apply to the two islands.

4.34. Sabah became independent and joined the Federation of Malaysia in 1963. The Indonesian Memorial considers 18 September 1969 as the critical date and adds:

> "Whatever the previous situation, it is therefore from 1969 that the respective claims of the Parties find themselves in effect 'legally neutralised'. Whatever either Party may do or say after this date, these actions are not relevant to the proceedings unless the Parties agree otherwise."[27]

Thus, on Indonesia's own account, it has to point to conduct in the short period between 1963 and 1969 which is sufficient to modify the established administrative and territorial arrangements. It has clearly failed to adduce any evidence capable of discharging this burden.

4.35. Malaysia has shown, in the Memorial, how the administrative activities continued after independence, in particular in relation to navigational aids,[28] but also to the spectacular development of tourism, starting in the mid-seventies.[29] The lighthouses erected by the British were regularly maintained by Malaysian officials, according to a report of 29 July 1970 by Major Sutoto, of the Indonesian Navy.[30] The affidavits offered by Indonesian officials confirm the existence of the lighthouses on the islands and do not pretend Indonesia was maintaining them.[31] Sipadan and Ligitan became Protected Areas under the Protected Areas Order in 1997. Access is limited today to protect the environment.[32]

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[27] IM, paras. 8.23 & 8.26, p. 158 & p. 159 respectively.

[28] MM, para. 6.25-6.29, pp. 69-70.

[29] MM, para. 3.19-3.20, p. 18.

[30] Annex IM 138, vol. 4.

4.36. Indonesia failed to protest at the continuing administrative action of Britain, then Malaysia, on the two islands. It did not object to the construction of the light tower in 1960. It had no reason to, as it had clearly represented, the same year, in Act No. 4, that Ligitan and Sipadan lay far out of the official baselines communicated to the world as embodying Indonesia's territorial and maritime position.

4.37. Indonesia seeks to rely on the petroleum concessions granted by both Parties. It quotes the Court's judgment in the *Continental Shelf (Libya/Tunisia)* case.[33] In that case, the Court was not concerned with territorial sovereignty but with maritime delimitation, which is quite a different matter. Petroleum concessions were considered relevant because they were at the heart of the dispute. As the Court noted:

> "...the line was not intended as a delimitation of a fisheries zone, or of a zone of surveillance. It was drawn by each of the two States separately, Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concessions, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya, has great relevance."[34]

4.38. The JAPEX concession can in no way be interpreted as a territorial claim. It does not concern territorial rights, but exclusively operations on the continental shelf, which is quite a distinct issue. It defines the "Contract Area" as...

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[31] IM, vol. 5, Affidavits, Annex D (Sailor 1st Class Ilyas, 1967), Annex H (Sergeant-Major Weku, 1968).

[32] MM, para. 6.31, p. 71.

[33] IM, para. 6.29, p. 109.

[34] I.C.J.Reports 1982, p. 84 (para. 118).

> "the continental shelves within the statutory mining territory of Indonesia covered by the Authority to Mine which is the subject of this Contract, which Contract Areas are outlined and described in Exhibit A and B attached hereto and made a part hereof. The Area as shown in Exhibit A shall be designated 'Offshore Bunje Area' and the Area shown in exhibit B shall be designated 'Offshore Nanakan Area'."[35]

Exhibit A-2 describes the perimeter of the Area by reference to Greenwich coordinates and specifically excludes Tarakan Island and Bunju Island from the Area.[36] The terms used are very similar to those noted by the Arbitration Tribunal in *Eritrea and Yemen Territorial Sovereignty (Phase One)*. The Tribunal concluded that the concession there "was granted and implemented in exercise not of Yemen's claims to sovereignty over the islands and their waters within the contract area but in the exercise of its rights to the continental shelf as they then were."[37] The JAPEX/PERMINA concession likewise was granted in the exercise of Indonesia's rights, as perceived by the Indonesian authorities, to the continental shelf and certainly not in relation to any claim to sovereignty over the islands and their waters within the contract area, much less beyond.

4.39. This does not mean that petroleum concessions are of no help in solving territorial disputes. It does mean they must be examined with caution, as their object and purpose is not territorial delimitation, still less territorial allocation, but rather granting rights over the continental shelf. *A priori*, they cannot be considered as "a highly relevant circumstance".[38] Moreover for a petroleum concession to carry any weight in the context of a dispute about territorial title, there must have been at least some degree of implementation, of activities in the area, of *effectivités*. Otherwise, it stands as a mere paper claim. In the *Continental Shelf (Tunisia/Libya)* case, both parties relied on material activities within the disputed area and objections thereto. There a Danish supply ship had effected a series of soundings in the disputed area.[39] Libya had placed four buoys in view of drilling operations, which triggered a Tunisian protest.[40] It completed the drilling of a dry hole and installed oil wells in the area in 1971 and 1975-76.[41] Tunisia placed three buoys in the disputed area. In 1976, a rig operated by an Italian company began drilling and prospecting the area. Later another rig took over drilling in the disputed sector. Both parties sent naval vessels, either to prevent or to protect the petroleum activities.[42] In the present case, no such *effectivités* are alleged by Indonesia. There is no *de facto* line because there are no facts.

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[35] Annex IM 129, vol. 4.

[36] Ibid.

[37] 114 I.L.R. at p. 102.

[38] IM, para. 6.29, p.109.

[39] *I.C.J. Pleadings*, Vol. I, Memorial of Tunisia, p. 39, para. 1.22; Vol. II, Counter-Memorial of Libya, pp. 167-8, para. 53.

4.40. Above all, to be of any significance as manifestations of sovereignty, the petroleum concessions must clearly include the disputed islands. As the Arbitration Tribunal in the *Eritrea and Yemen Territorial Sovereignty (Phase One)* arbitration noted:

> "In the view of the Tribunal, the Seismic Permit Agreement of itself does not constitute a claim by Yemen to sovereignty over the islands within its contract area, nor does Eritrea's failure to protest the agreement indicate acquiescence in any such claim. However to some extent it presuppose some measure of title to any islands contained within the contract area."[43]

And referring to another contract, the Tribunal added:

> "Since the agreement area does not include any of the islands in dispute, it is of limited interest for these proceedings..."[44]

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[40] Ibid., Vol. I, p. 41, para. 1.27.

[41] Ibid., Vol. II, Counter-Memorial of Libya, p. 167, para. 52.

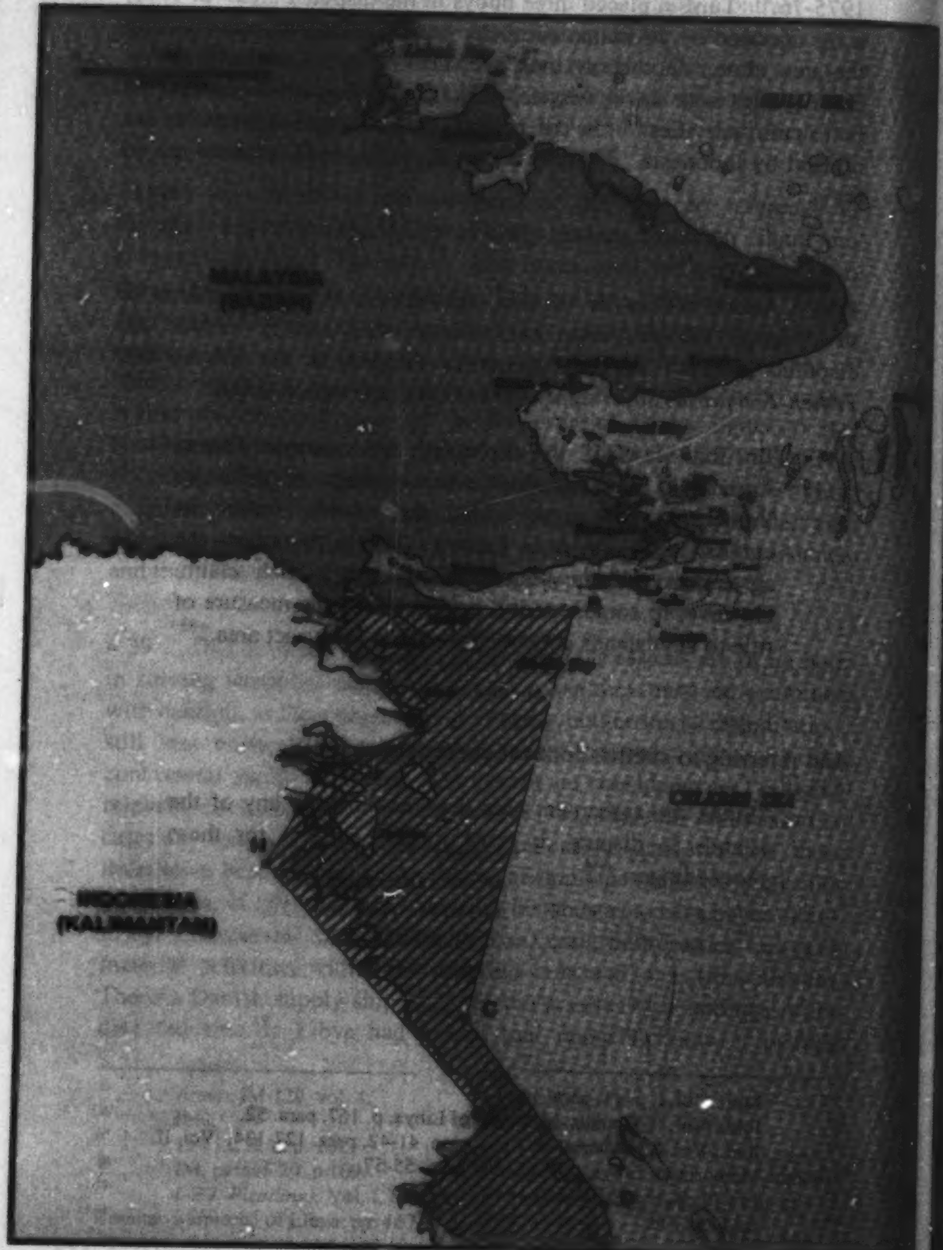
[42] Ibid., Vol. I, Memorial of Tunisia, pp. 41-42, para. 127-134; Vol. II, Counter-Memorial of Libya, pp. 168-170, para. 55-57.

[43] 114 I.L.R. at pp. 104-105.

[44] Ibid., p. 108.

Insert 8

1966 PERMINA/JAPEX Concession


SULU SEA
MALAYSIA
(SABAH)
Darvel Bay
CELEBES SEA
INDONESIA
(KALIMANTAN)

4.41. The two petroleum concessions mentioned in the Indonesian Memorial do not include the two islands. The Indonesian concession to Permina/Japex starts some 20 nautical miles east of Sipadan and runs eastward.[45] Indonesia was attentive to the inclusion or exclusion of islands from the area conceded, as the Permina/Japex contract of 6 October 1966 shows, since it specifically excludes certain islands from the contract area.[46] Insert 8 shows the area covered by the concession. The Malaysian TEISEKI concession lies north of the two islands. Neither agreement area includes any of the islands in dispute. They are thus of "limited interest for these proceedings". Moreover the relevant maps are on large scale.

4.42. Concessions may be an occasion for *effectivités* to develop on the islands, even if they are not included in the perimeter. The Arbitration Tribunal in *Eritrea and Yemen Territorial Sovereignty (Phase One)* noted the construction of an airstrip by a petroleum company on one of the disputed islands and attributed significance to it.[47] Nothing of the sort happened in regard to Sipadan and Ligitan, so far is Indonesia is concerned. Nothing done pursuant to the Indonesian concessions approached or affected the islands. There was no construction on the islands, no drilling in their territorial waters, or indeed anywhere close to the islands which might have drawn Malaysia's attention to the fact of a claim. None of this is surprising since, as shown above, the Indonesian concessions bore no relationship to the islands. In any event, as it happened, the concessions did not prove of any geological interest and lapsed.

4.43. Indonesia seems to imply that the petroleum concessions constituted some sort of an implicit agreement among the Parties as to the offshore territorial delimitation. But that calls for substantial evidence, including evidence of practice following the grant of the concessions. In the *Libya/Tunisia Continental Shelf case*, the Court pointed out:

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[45] 4° 9' 30" N., 117° 32' 30" E.

[46] IM Annex 129, vol. 4.

[47] 114 I.L.R. at p. 109.

> "It should be made clear that the Court is not here making a finding of tacit agreement between the Parties – which, in view of their more extensive and firmly maintained claims, would not be possible – nor is it holding that they are debarred by conduct from pressing claims inconsistent with such conduct on some such basis as estoppel."[48]

4.44. In the present case, it must be proved that the petroleum concessions amounted to a complete reversal of the Indonesian position, just a few years after publication of Act No. 4. And that Malaysia entered an international agreement in total contradiction with its consistent practice, before and since.

4.45. If considered to be subsequent practice of the Parties, the oil concessions must at least meet the standard of subsequent practice recently examined by this Court in the *Kasikili/Sedudu* case.[49] Nothing of the sort appears from a close examination of the concessions. The petroleum authorities that issued them had no competence to determine or modify the international boundaries of their respective States or to interpret international treaties on these issues. They did not purport to do so. The Indonesian authorities issued concessions that lay far away from the disputed islands and in no way asserted any claim to sovereignty or to economic rights in the area around the islands. Neither Party proceeded on the basis that they were implementing a general principle regarding a 4° 10′ N boundary out to sea. That was not the point of the concessions.

4.46. As to the other activities, a perusal of the affidavits produced by Indonesia[50] confirms that there were no significant activities in terms of subsequent practice. There were occasional patrols by the Indonesian Navy ships, but it was quite an exceptional practice (Affidavits C to H) and the patrols seemed uneventful. As to the

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[48] I.C.J. Reports 1982, p. 84 (para. 118).

[49] Judgment, 13 December 1999, paras. 47-80.

[50] See IM, vol. 5.

Indonesian fishermen, a few would fish off Sipadan, generally sleeping on their boats. They would take refuge on the island only in case of bad weather (Affidavits I to M). One fisherman witnessed the presence of huts occupied by people coming from "Derawan Island". In 1992, according to Indonesia, a group of Indonesian scouts spotted an old pier, an old house belonging to a Bajau and about 20 huts, presumably occupied by Bajaus. It is not suggested in the affidavit that the people observed on the island were not Malaysian citizens.

4.47. From 1988 on, navy patrols and diplomatic protests became frequent.[51] For instance, on 6 June 1993, well after the critical date, the Bulungan Regency sent out a strong Indonesian party of 66 persons to Sipadan. They must have astonished the tourists in the 50 tourist huts they counted along with the 60 tourist employees and the 786 turtles. They noted that the Bajau tribe had "governed the island since 1933" and that the tourist activity started in 1990. On the island, there were a Malaysian wildlife guard and security officers from three travel agencies. The Indonesian team declared it was ready to defend the "sovereignty" of Indonesia, then left the island to report to the Regency. They do not seem to have come back.[52] As to the island of Ligitan, Haji Zaenuddin Effendy, a fisherman, is the only one who mentions having been on the island when his boat drifted and became stranded (Affidavit L).

4.48. No Indonesians, private citizens or otherwise, claim to have occupied the island or to have had any economic activity on the island. Whatever off-shore activity there was was certainly far below the minimum standards set by the Court to qualify as subsequent practice in the sense of article 31, para. 3 (b) of the Vienna Convention. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court noted that :

> "To establish such a practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by

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[51] MM, para. 4.5, p. 28; IM, paras. 8.70-8.96, pp. 171-182.

[52] Annex IM 163, vol. 4.

> the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[53]

In that case, the Court considered that peaceful occupation, agricultural and pastoral activities by the Masubia tribesmen for nearly a century did not meet the standard of subsequent practice. Occasional and incidental Indonesian activities on or around Sipadan and Ligitan are a far cry from even that activity.

D. General Conclusions

4.49. To sum up the practice of the Parties, before and after independence, as regards Sipadan and Ligitan :

(a) The Sultanate of Bulungan was a minor land-based polity. The Sultan never exercised any authority on the islands off mainland Borneo, contrary to the Sultan of Sulu, whose State was a maritime empire. There is no trace of any activity of the Sultanate of Bulungan or of its inhabitants related, directly or indirectly, to Ligitan and Sipadan during the pre-colonial period.

(b) The British North Borneo authorities administered the two islands in a normal way, having regard to the particular geographical circumstances. In particular, they regulated the major economic activity, turtle egg collection, erected lighthouses and declared Sipadan a bird sanctuary. Malaysia continued this peaceful administration.

(c) The Netherlands showed no interest, enacted no particular legislation and never objected to British administration of the islands.

(d) Independent Indonesia did not show any interest whatsoever in the islands for over 25 years.

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[53] Judgment, 12 December 1999, para. 74.

(e) Indonesia formally proclaimed its base-lines and territorial waters by Act No. 4 in 1960. It excluded Sipadan and Ligitan from its territory by fixing the easternmost base-line point in the area on the east coast of Sebatik and the limit of its territorial waters 12 miles out at sea, some 35 nautical miles distant from Sipadan and even further from Ligitan.

(f) Petroleum concessions in the sixties did not concern territorial delimitation and never included the two islands in conceded perimeters. No activity pursuant to the Indonesian concessions had any relation to the islands.

(g) The affidavits provided by Indonesia prove that Indonesian *effectivités* certainly did not qualify as subsequent practice, as defined by the Court in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*.

(h) When the first Indonesian claim to the islands was voiced in 1969, Malaysia immediately challenged it.

(i) The practice of the parties confirms the interpretation of the 1891, 1915 and 1930 treaties as stated in the preceding Chapters. It does not indicate any subsequent agreement or practice to the contrary.

Chapter 5

OFFICIAL AND OTHER MAPS SUPPORT MALAYSIA'S TITLE TO THE ISLANDS

A. Introduction

5.1. Never in the Court's history, it seems, has a sovereignty claim depended so exclusively and so much on a single map, as Indonesia's claim to the two islands depends on the internal Dutch map. The arguments based on that map have already been comprehensively dealt with.

5.2. In addition, however, Indonesia relies on a number of other maps, Dutch and British, Indonesian and Malaysian. In its view, the maps of both parties "point consistently in the same direction as that which follows from the terms of the 1891 Convention".[1] Malaysia has already dealt with many of these maps in Chapter 10 of its Memorial, and it will not repeat the detailed account given there. As shown, the preponderance of the map evidence on both sides supports the Malaysian position. Of particular significance are two maps following upon the 1891 Treaty:

(1) The first detailed and official Dutch map of the Southern and Eastern Division of Borneo, published in Batavia in 1913, which shows the 1891 boundary stopping at the east coast of Sebatik and specifically attributes the group of islands including Sipadan and Ligitan to the "Gouv' van Britisch Noord-Borneo".[2]

(2) Even more important is the 1915 Map, signed by both parties and annexed to the Agreement of 1915, which demarcated the boundary across Sebatik.[3] The red line on the agreed map clearly stops at the east coast. As pointed out in Chapter 2, if there were any doubt at all as to the meaning of the 1891 Boundary Convention, it is resolved by this

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[1] IM, para. 6.37, p. 112.

[2] See *Schetskaart van de Residentie Zuider- en Oosterafdeeling van Borneo*, Topografische Inrichting, Batavia, 1913: MM, Annexes, vol. 5, Map 1.

[3] See above, page 47.

map, which constitutes an authoritative interpretation of the 1891 Convention by the parties to it. Moreover it is the *only* official, agreed map representing the effect of the 1891 Convention so far as Sebatik is concerned. This gives it a unique status for the purposes of the present case.

5.3. In an attempt to deny the effect of the 1915 Map, the Indonesian Memorial invokes a selection of maps to show either that the two islands were considered as belonging to Indonesia or at least that they were considered as falling outside the limits of Malaysia. In this Chapter, Malaysia will deal with the maps invoked by Indonesia, especially those which were not discussed in Chapter 10 of Malaysia's Memorial. It will also consider a number of further maps of Dutch and Indonesian provenance. It will then turn to consider the legal effects of maps, in accordance with the useful recent indications given by the Court in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*. Finally, a brief summary will be given as to the conclusions to be drawn from the map evidence taken as a whole.

B. Indonesia's arguments based on various maps

5.4. It is necessary to distinguish the maps placed by Indonesia before the Court by reference to their period as well as their provenance.

(a) Maps before 1891

5.5. Indonesia asserts that:

> "Dutch cartography prior to the signature of the 1891 Convention shows that The Netherlands viewed the islands of Ligitan and Sipadan as being subject to its sovereignty."[4]

In support it cites a single map by De Sturler of 1881.[5] The map (which is non-official) is on an extremely small scale, covering the whole of South-East Asia from Burma to New Guinea. It says nothing at all precise about boundaries in any legal sense. Its depiction of north-east Borneo is highly approximate. It is

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IM, paras. 6.41, p. 113.

IM, Map Atlas, Map 1.

not clear that it even depicts Sebatik, let alone smaller islands. It is useless as evidence on any question of detail.

5.6. Other Dutch maps are more helpful, as well as more accurate, in depicting the area and Dutch claims to it. For example, the Dutch claim which was the basis of the negotiations leading to the 1891 Boundary Convention is shown on the map reproduced at Indonesia's Map Atlas, Map 2. It clearly did not extend further east than Batu Tinagat and showed no allocation line of any kind. The map does not actually show Sipadan and Ligitan, but it plainly attributes all the islands east of Batu Tinagat to North Borneo, including Mabul, Si Amil and Danawan. British maps depicting the Dutch claim at this time are to similar effect.[6]

5.7. To summarise, to the extent that "Dutch cartography" before 1891 showed the coast accurately and in detail, it depicted the area where Sipadan and Ligitan are located as within the sphere of Sulu and later, British North Borneo. Indeed, there is, so far as Malaysia is aware, *no* Dutch map of this period which did show the islands and depicted them as belonging to the Netherlands or to Bulungan.

(b) Maps in the period 1891-1945

5.8. The first map in the period 1891-1945 which requires noting is the Dutch internal map.[7] As to this, it has already been shown (a) that it was produced after the 1891 Convention was signed; (b) that there is no record of any official transmittal of the map to Great Britain, and (c) that Great Britain never accepted that map, by words or conduct.[8] But for present purposes it is worth recalling its defects as a map said to depict a claim to two islands never mentioned in the negotiations. First of all, it does not show Sipadan at all: anyone looking at the map would have no way of knowing that Sipadan exists, let alone that it falls to the south of the line. Secondly, it does show an unnamed island which from its position relative to "Danoean" and Si Amil can only be Ligitan, but (wrongly) shows it to the north (as well as to the east) of the line.

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[6] See the map drawn by Stanford's for the BNBC in 1888: IM, Map Annex, Map 3. That map does not show any of the smaller offshore islands south of Bum Bum Island.

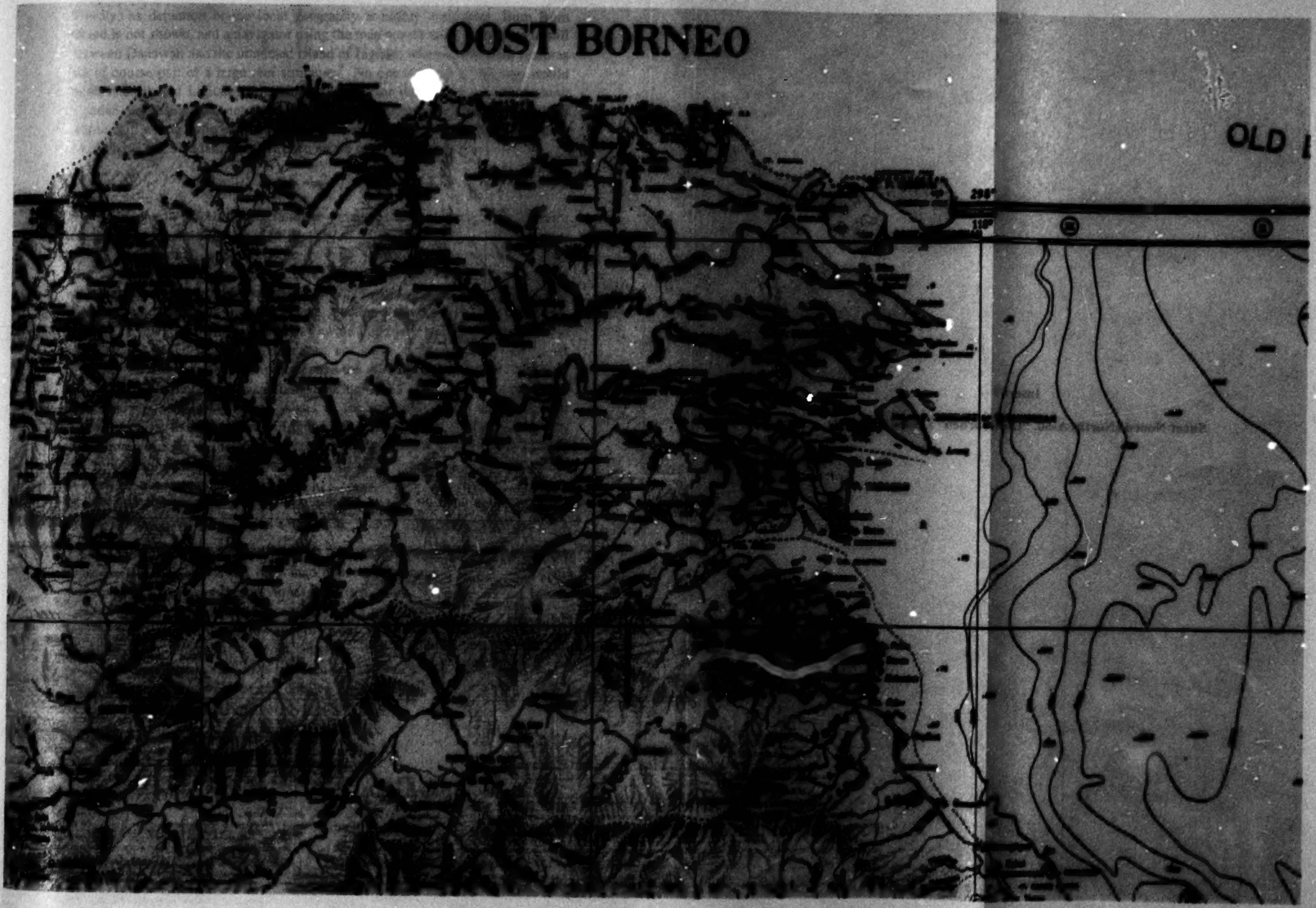
[7] IM, Map Atlas, Maps 5 & 6.

[8] See above, paras. 2.49-2.59.

OLD

Insert 9

Sheet NA-50 "Oost Borneo" (1935) (Extract)


OOST BORNEO
OLD

Thirdly, its depiction of the local geography is highly inaccurate: Bum Bum island is not shown, and a navigator using the map would think it possible to sail between Danawan and the unnamed island of Ligitan, whereas the three features are of course part of a large reef structure.[9] No one looking at the map would think it attributed Ligitan to the Netherlands. Nor does it say anything about Sipadan, because it does not show it. With their propensity for getting details of this terrain wrong, who can know where the drafters of the internal Dutch map would have put Sipadan, had they been aware of its existence?

5.9. Indonesia also produced another small-scale map, from "The Century Atlas", a commercial publication of 1897.[10] This shows, as a "Boundary of Dutch possessions", a curved line running lengthwise down Sebatik, then turning to run eastwards for approximately 700 miles. It is the sole "evidence of general repute" produced by Indonesia for this period. Again the map is useless as evidence of anything in relation to a specific dispute concerning two small islands. Evidently the map-maker was aware that there had been an agreement dividing the island of Sebatik, but does not seem to have been aware of its content. Sebatik is in the wrong place, and the dividing line at no stage follows the 4°10' N parallel. The map shows one unnamed island to the south of its "Boundary": there is in fact no island in the position shown, but the island shown is closer to the position of Ligitan rather than Sipadan. The map is very inaccurately drawn at the level of detail. It also shows some coastal islands south of the line (e.g. what appears to be Nunukan) in the red colour designated for British, not Dutch, territory.

5.10. Then there is Stanford's map of 1903, on which Indonesia places great store.[11] The map shows the 1891 land boundary, accurately drawn, as a thick red line. It also shows the provinces of British North Borneo by a red dotted line. Those provincial boundaries extend well out to sea, not reflecting the 3 marine league limit of the Sulu Grant of 1878. Sipadan is shown to the south of the dotted line depicting the BNBC Province of Elphinstone. (The settlement shown as Port Elphinstone was later renamed Semporna.) The map does not name Ligitan but shows what can only be Ligitan to the north of the provincial line. It does not attribute Sipadan to any other State.

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[9] As shown in the aerial photograph which is at MM, p. 23.

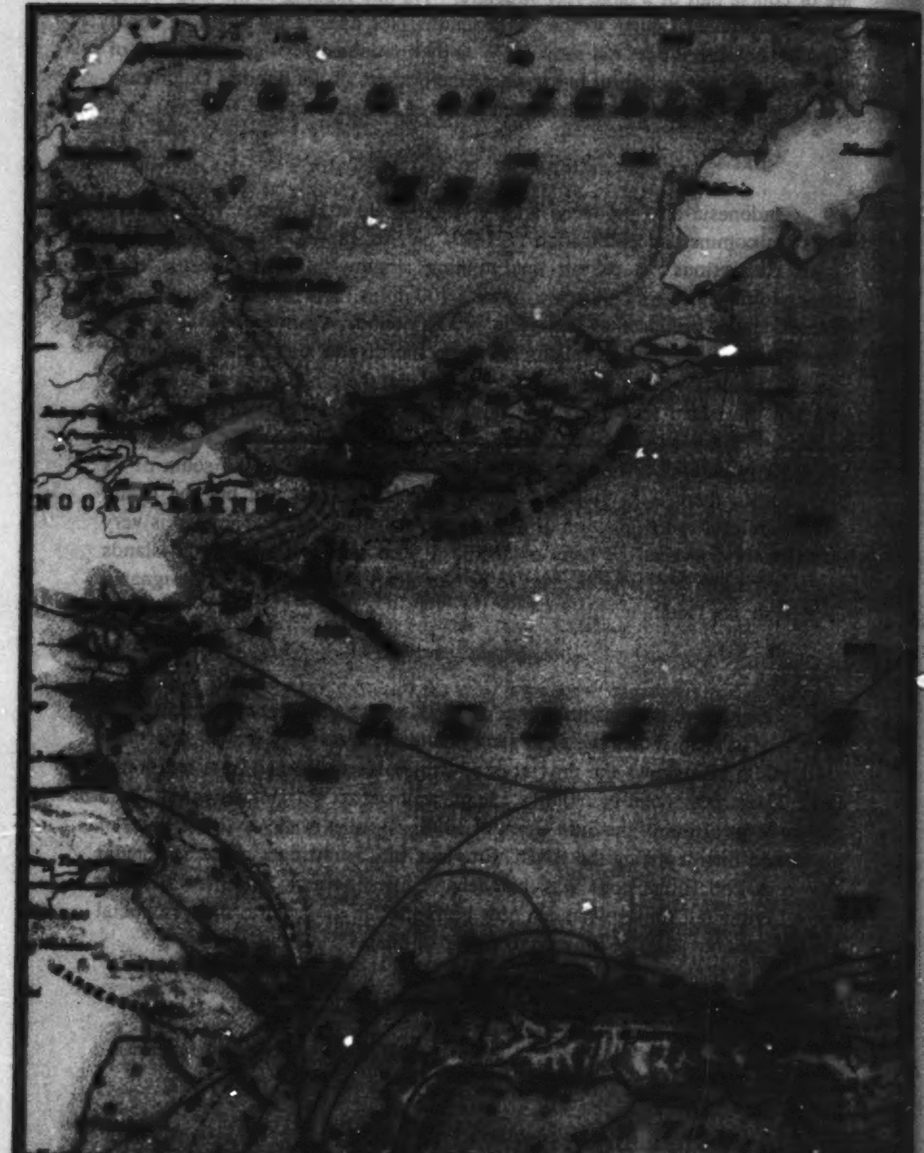
[10] IM, para. 6.58, p. 119; IM, Map Atlas, Map 7.

[11] IM, para. 6.52, p. 118 & Map 6.4, paras. 7.13-7.14, pp. 132-132, also IM, Map Atlas, Map 9.

Insert 10

Survey Map of the Netherlands East Indies Archipelago

(1897-1904)


NOORD-BORNEO

5.11. Indonesia argues[12] that in accordance with the 1903 Stanford's map "[b]oth islands were clearly recognised as belonging to Dutch Borneo". There is no basis for that assertion. Ligitan (unnamed but recognisable by its relation to Danawan and "Si Anal" (another misprint)) lies within Elphinstone Province, Sipadan lies outside it. The international boundary line of 1891 is not extended out to sea. The map does not attribute Sipadan to any other State. At the time, as has been shown, sovereignty over Sipadan was with the United States. Indeed the map was produced in the year of the voyage of the *Quiros*, when Sipadan was specifically claimed for the United States, a claim subsequently recognised by Great Britain.

5.12. Quite contrary to the position taken by Indonesia in its Memorial, all the post-1891 Dutch maps that have been found in the course of research on the present dispute either (a) show the 1891 boundary stopping at the east coast of Sebatik, or (b) show a short projection of that boundary, in no case extending more than a few nautical miles off-shore, and apparently representing a territorial sea boundary. So far as Malaysia has been able to find, there is not a single Dutch map that gives any credence whatever to the Indonesian claim. The following may be noted, by way of example.

5.13. Malaysia has found in the Exhibits to the US Counter-Memorandum in the *Island of Palmas* case an additional Dutch map composed during the years 1897-1904. It has the following title: "Survey Map of the Netherlands East Indies Archipelago"[13], with the following additional inscription: "Netherlands East Indies, composed during the years 1897-1904 by the Topographical Bureau at Batavia, (remodeled edition of the Atlas by J.W. Stemfoort and J.J. ten Siethoff) reproduced by the Topographical Service at The Hague during the years 1898-1907 under the direction of the Director C.A. Eckstein, published by the order of the Department of Colonies"[14]. A photo-reduced copy of the map appears opposite as Insert 10[15]. The map thus appears to have an official provenance or approval. It is on a scale of 1:6 500 000. Although this scale is relatively small, the detail on the map is sufficiently clear to show the land boundary coming in from the west to cross the island of Sebatik and terminating at its east coast. There is no extension seaward. The orange line represents the district boundary. The small dots or crosses that appear in the sea just east of Sebatik are sandbanks and reefs. The map carries no suggestion of the existence of any Dutch claim to sovereignty over any islands east of Sebatik.

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[12] IM, para. 6.56, p. 119.

[13] Translated from Dutch: "*Overzichtskaart van den Nederlandsch Oost Indischen Archipel*".

[14] Translated from Dutch: " *Nederlandsch Oost-Indië, Bij het topographisch Bureau te Batavia samengesteld in de jaren 1897-1904 (omgewerkte uitgave van den Atlas van J. W. Stemfoort en J. J. ten Siethoff), bij de topographische inrichting te 's Gravenhage gereproduceerd in de jaren 1898-1907 onder leiding van den directeur C. A. Eckstein, Uitgegeven op last van het Departement van Koloniën*".

[15] The full sized map appears in MCM, vol. 2, Map 1.

5.14. Following surveys in 1902-03 by the Macasser, the Department of Hydrography of the Dutch Ministry of the Navy published, in September 1905, a large nautical map (scale, 1:200,000). It is entitled "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary".[16] On this rather detailed map (reproduced in vol. 2 of this Counter-Memorial, Map 2), the maritime boundary clearly stops on the east coast of Sebatik, while both Sipadan and Ligitan are depicted on the map along many other islands in northern Borneo. There is also an updated 1915 version of this map with the indication that extensive corrections were made, i.e. after the further 1915 Boundary Agreement. The 1915 map shows exactly the same picture as the 1905 map: the 1891 boundary stops at the east coast of Sebatik (see vol. 2 of this Counter-Memorial, Map 3).

5.15. By a formal decision of 1 February 1913, the Government of the Netherlands East Indies determined the administrative structure of the Southern and Eastern Borneo Residence. In the map accompanying the decision, no boundary east of Sebatik was shown, nor were the islands of Sipadan and Ligitan included on the map.[17] An extract from the map is shown opposite as **Insert 11.**

5.16. Before the First World War, a project entitled "International Map of the World" was inaugurated, using a scale of 1:1,000,000. Individual sheets conformed to a standard size (4° of latitude by 6° degrees longitude); they were designated by a special sheet numbering system, and were produced by the

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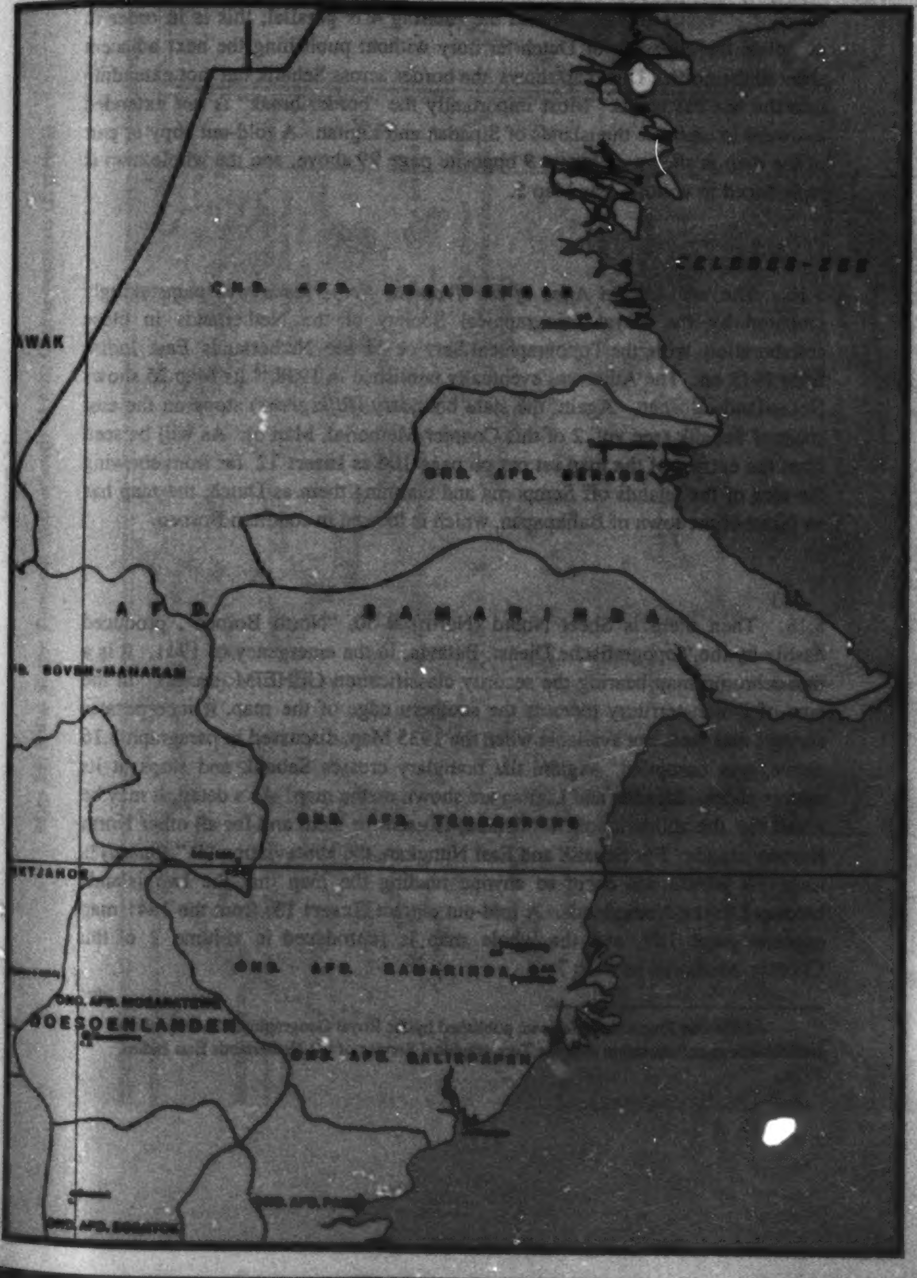
[16] "Oostkust Borneo. Eiland Tarakan tot Nederlandsch-Engelse Grens", reported in *Catalogue of Indonesian Charts and Books*, Batavia, 1954.

[17] See Government Gazette (*Staatsblad* 1913) No. 199.

Insert 11

Administrative Structure of the Southern and Eastern Borneo Residence (1913) (Extract)


CELEBES-ZEE
OND. AFD. BOELOENGAN
AWAK
OND. AFD. BERAOE
AFD. SAMARINDA
B. BOVEN-MAHAKAM
OND. AFD. TENGGARONG
ETJANOE
OND. AFD. SAMARINDA
OND. AFD. MOEARATEWE
DOESOENLANDEN
OND. AFD. BALIKPAPAN
OND. AFD. PASIR
OND. AFD. BOENTOK

national mapping organisations of many countries, coordinated by a Central Bureau. Sheet NA 50, "Oost Borneo", was compiled and printed by the Topografische Dienst, Batavia, in 1935. The particular significance of this map for the present case is that it shows the area of northern Dutch Borneo in the form of a "border break" beyond the limiting 4°N parallel; this is in order to complete the coverage of Dutch territory without publishing the next adjacent sheet to the north. This map shows the border across Sebatik but not extending into the sea eastwards. Most importantly the "border break" is *not* extended eastward to embrace the islands of Sipadan and Ligitan. A fold-out copy of part of the map is shown as Insert 9 opposite page 99 above, and the whole map is reproduced in volume 2 as Map 5.

5.17. The well-known *Atlas of the Tropical Netherlands* was painstakingly prepared by the Royal Geographical Society of the Netherlands in close collaboration with the Topographical Service of the Netherlands East Indies from 1915 on. The Atlas was eventually published in 1938.[18] Its Map 25 shows Netherlands Borneo. Again, the state boundary (*Rijksgrens*) stops on the east coast of Sebatik (see vol. 2 of this Counter-Memorial, Map 6). As will be seen from the extract of the map set out on page 106 as Insert 12, far from showing the area of the islands off Semporna and claiming them as Dutch, the map has an insert of the town of Balikpapan, which is located in southern Borneo.

5.18. Then there is Sheet Noord (North) B-50, "North Borneo", produced hastily by the Topografische Dienst, Batavia, in the emergency of 1941. It is a monochrome map bearing the security classification GEHEIM (secret). In the area of Dutch territory towards the southern edge of the map, it incorporates surveys that were not available when the 1935 Map, discussed in paragraph 5.16 above, was compiled. Again, the boundary crosses Sebatik and stops at its eastern shore. Sipadan and Ligitan are shown on the map. As a detail, it may be noted that the abbreviation "I." (island) is used for them and for all other North Borneo islands. For Sebatik and East Nunukan, the abbreviation "P." (*pulau*) is used. It would not occur to anyone reading the map that the two islands belonged to the Netherlands. A fold-out extract (Insert 13) from the 1941 map opposite page 107, and the whole map is reproduced in volume 2 of this Counter-Memorial as Map 7.

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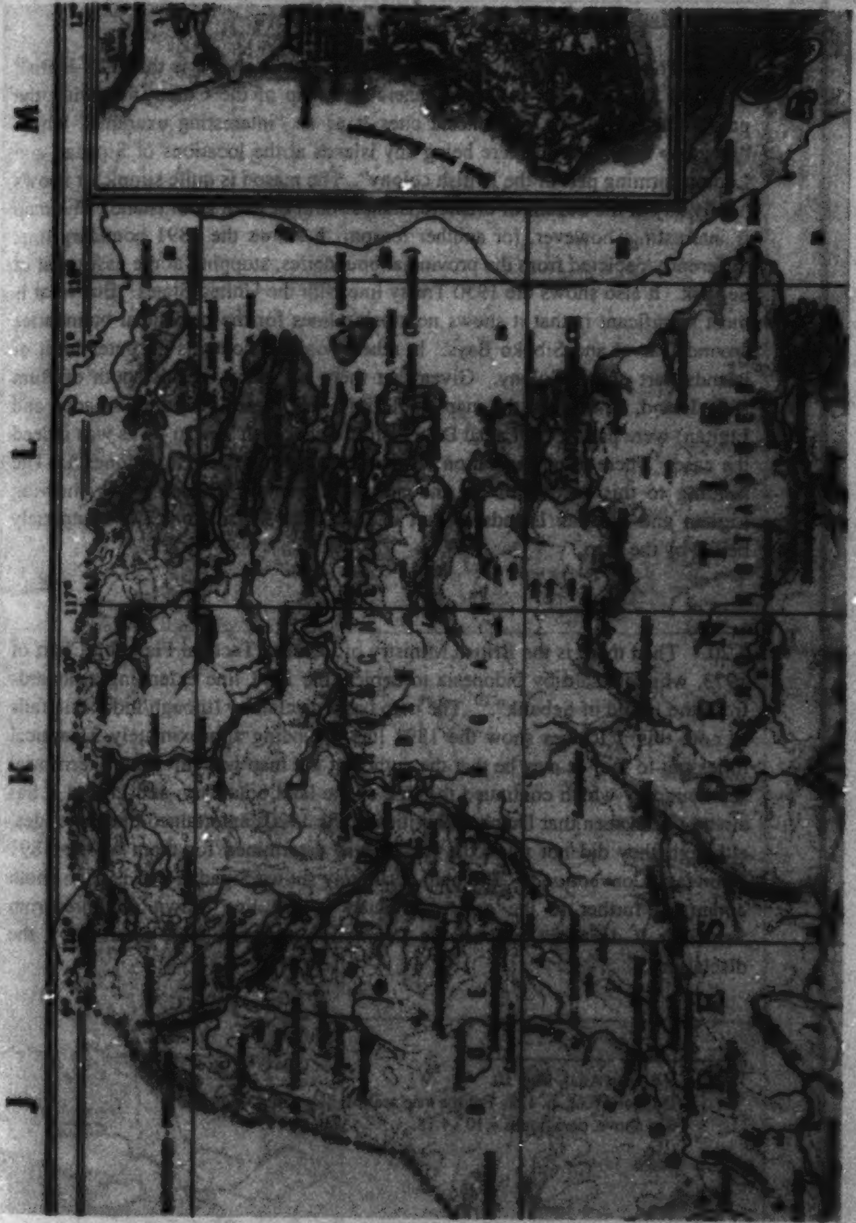
[18] *Atlas van Tropisch Nederland*, published by the Royal Geographical Society of the Netherlands in collaboration with the Topographical Service of the Netherlands East Indies, 1938.

Insert 12

Map 25, Atlas of the Tropical Netherlands (1938) (Enlargement) (Extract)



(c) Maps covering the period since 1945

5.19. The first map mentioned by Indonesia in this period is the 1953 British Colonial Map.[19] This is a very generalised map of the Colony, showing the provincial boundaries. Indonesia cites it as an "interesting example" which "gives no indication of there being any islands at the locations of Sipadan and Ligitan forming part of the British colony". The reason is quite simple: it shows hardly any of the dozens of offshore islands south of Bum Bum Island. The map *is* interesting, however, for another reason. It shows the 1891 boundary line, differently depicted from the provincial boundaries, stopping at the east coast of Sebatik. It also shows the 1930 Treaty line with the United States. But what is most significant is that it shows no closing lines for the provincial boundaries around Darvel and Sibuko Bays. In other words, it contains no outer limit of islands part of the Colony. Given that there are many islands south of Bum Bum Island, a reader of the map would infer that these (including Sipadan and Ligitan) were part of the Lahad Datu district rather than Tawau — as was indeed the case. There is no indication whatever that they belong to Indonesia. The heading to this section of the Indonesian Memorial, "British Maps showing Ligitan and Sipadan Islands as Part of the Dutch Possessions", is completely belied by the map.

5.20. Then there is the British Ministry of Defence Tactical Planning Chart of 1973, which is said by Indonesia to depict "the 1891 line extending eastwards from the island of Sebatik".[20] The map has a disclaimer (though Indonesia fails to note this). It does show the 1891 line extending approximately 3 nautical miles out to sea. It may be that the author of the map was inferring a territorial sea boundary which continued the line of the land boundary, and indeed it has already been seen that Dutch authorities in the 1920s entertained the same idea, although they did not think the matter was determined for them by the 1891 Boundary Convention.[21] The map accurately shows Sipadan and Ligitan (both unnamed) further to the east, unaffected by the line drawn offshore from Sebatik. It does not support the Indonesian position, quite apart from the disclaimer.

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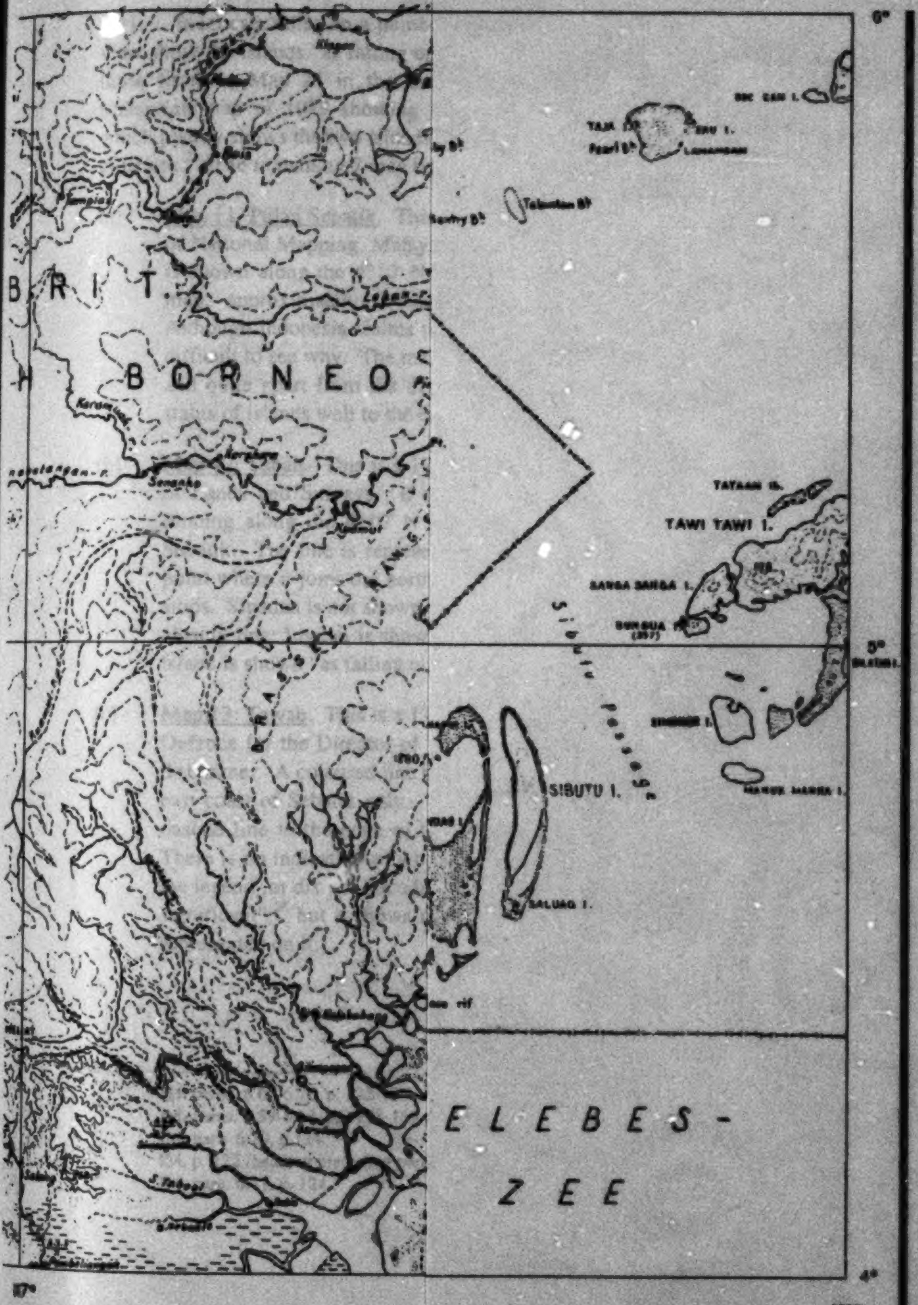
[19] IM, Map Atlas, Map 10.

[20] IM, para. 6.65, p. 122. For the map see IM, Map Atlas, Map 19.

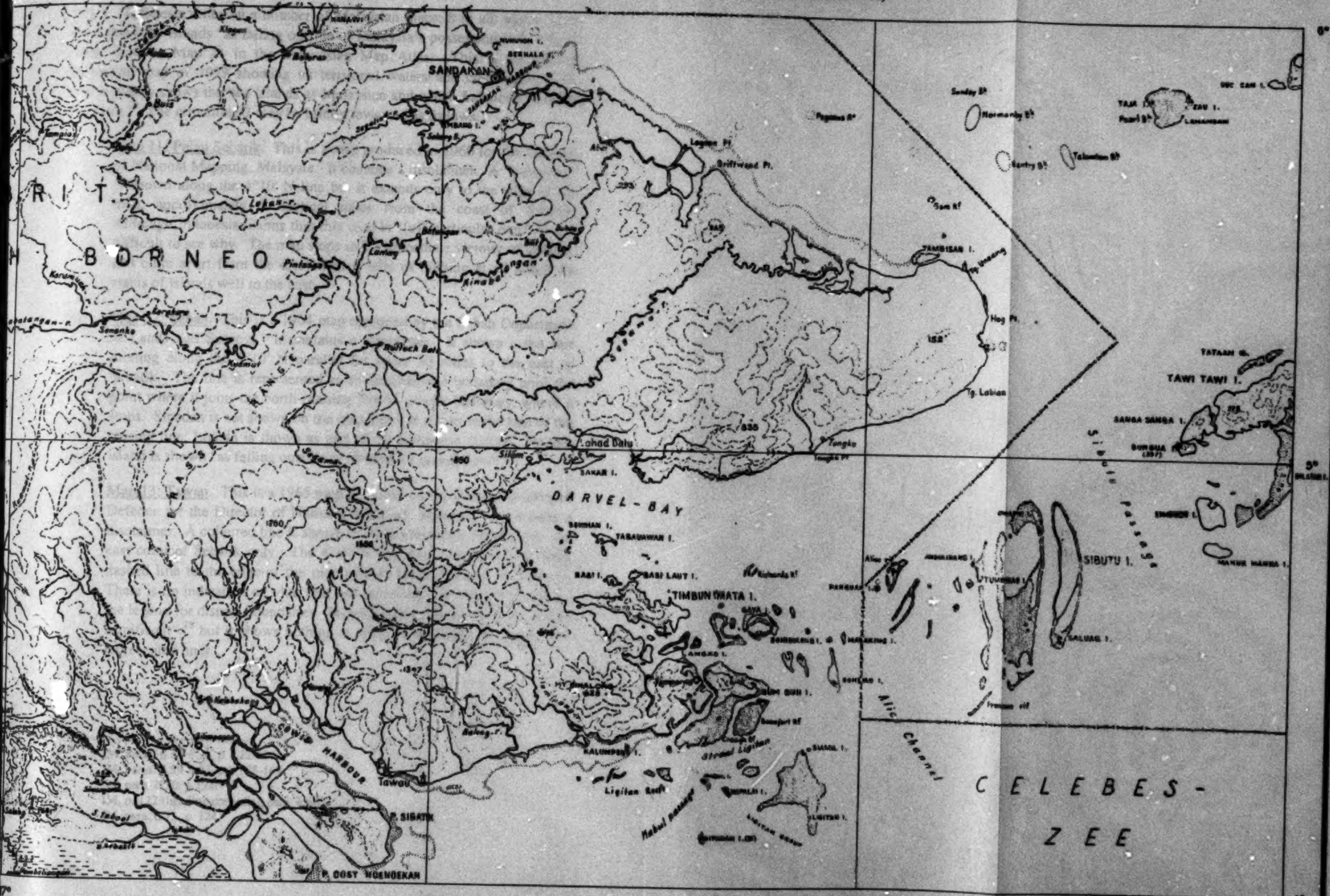
[21] See above, paragraphs 4.10 - 4.18.


6°
TAWI TAWI I.
TATAAN IS.
SANGA SANGA I.
BONGAO
(307)
Sibutu passage
5°
SIBUTU I.
SALUAG I.
MANUK MANKA I.
BRIT. NORTH BORNEO
CELEBES-ZEE
4°
117°
120°

Auteursrecht voorbehouden (Stbl. 1912 No. 600).

Insert 13

Sheet Noord (North) B-50 "North Borneo" (1941) (Extract)


BRIT. NORTH BORNEO
SANDAKAN
BERHALA I.
Kinabatangan
Lamag
Segama
Lahad Datu
Silam
SAKAR I.
Tungku
Tungku Pt.
Tg. Labian
Hog Pt.
TAMBISAN I.
Bagahak
Logkon Pt.
Driftwood Pt.
Pegasus Sh.
Sanday Sh.
Normanby Sh.
Sentry Sh.
Taluntum Sh.
DARVEL-BAY
BOHIHAN I.
TABAUAWAN I.
BAGI I.
BAGI LAUT I.
TIMBUN MATA I.
GAYA I.
SEMBOKING I.
MATAKING I.
BOHEYDULANG I.
SIAMIL I.
DENAWAN I.
SIPADAN I.
LIGITAN I.
Ligitan Reefs
Mabul passage
Ligitan Reefs
Straat Ligitan
KALUMPANG I.
MT. SINALONG
Tawau
COWIE HARBOUR
P. SIBATIK
P. OOST NOENOEKAN
Alice Channel
Sibutu Passage
SIBUTU I.
TUMINDAO I.
SALUAG I.
Frances rif
TAWI TAWI I.
TATAAN IS.
SANGA SANGA I.
BONGAO
SIMUNUL I.
MANUK MANKA I.
TAJI I.
CAGAYAN
CELEBES-ZEE
118°
119°
120°
6°
5°
4°
117°

Auteursrecht voorbehouden (Stbl. 1912 No. 600).

5.21. Indonesia relies on a number of Malaysian maps, 8 in all, which in its view show the islands "as falling outside of Malaysia's possessions".[22] One of those listed is Map 21 in the Indonesian Map Atlas. This is the official Malaysian map of 1979 showing its territorial waters and continental shelf, which plainly shows the two islands as Malaysian and which Indonesia strongly criticises.[23] The remaining 7 may be briefly reviewed as follows:

(a) Map 11: Pulau Sebatik. This is a map produced in 1960 for the Director of National Mapping, Malaysia. It contains a disclaimer. A "boundary" is shown along the 4°10' N line but it extends only to the edge of the map, approximately 2 nautical miles from the coast of Sebatik. Although Indonesia claims that this map is "[o]f particular note",[24] it is difficult to see why. The map stops in the immediate vicinity of Sebatik, and quite apart from the disclaimer it tells us nothing at all about the status of islands well to the east.

(b) Map 12: Sabah. This is a 1964 map compiled by the Sabah Department of Lands and Surveys. It contains a disclaimer. It shows a red line running along the 4°10' N parallel for some 30 miles to the east of Sebatik. The line is represented as an international boundary until the point where it joins the north-running Tawau district boundary, where it stops. Sipadan is not shown on the map, but it is in fact to the east of the closing line; Ligitan is shown as part of the Semporna district. Neither island is shown "as falling outside of Malaysia's possessions".[25]

(c) Map 13: Tawau. This is a 1965 map produced by the British Ministry of Defence for the Director of National Mapping, Malaysia. It contains a disclaimer. A coloured line is shown as the international boundary to the east coast of Sebatik only. The 4°10' N line then continues as a black dashed line to the edge of the map (not as far as Sipadan or Ligitan). There is no indication of what that line represents. It is not the same as the legend for district boundaries. Indonesia describes the map as "[a]lso significant",[26] but it shows nothing at all as to the status of islands not represented on it.

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[22] IM, paras. 6.66-6.76, p. 122-126.

[23] IM, paras. 8.59-8.63, pp. 168-169.

[24] IM, para. 6.70, p.124.

[25] IM, p. 122 (heading preceding para. 6.66).

[26] IM, para. 6.71, p. 124.

(d) Map 14: Sabah. This is a black and white version of Map 12, discussed in sub-paragraph (b) above. The same comments apply to it.

(e) Map 16: Oil Prospecting Licenses and Leases. This is the Malaysian oil concession map, which has already been discussed.[27] It is highly generalised and does not show either of the disputed islands.

(f) Map 18: Sabah. This is a reprint of Map 12, discussed in sub-paragraph (b) above. The same comments apply to it.

(g) Map 20: Sabah Population and Housing Census. This small-scale map, published by the Malaysian Department of Statistics in 1974, was intended to show in general terms the distribution of population in Sabah. It contains a disclaimer. It shows the international boundary stopping within 3 miles east of Sebatik: an innominate 4°10' N line then proceeds eastwards. It shows only a few of the islands off the coast and does not show Sipadan or Ligitan. It is highly generalised and evidently of no value on any question of detail, quite apart from the disclaimer.

Thus of the seven remaining maps mentioned by Indonesia, three (Nos. 12, 14 and 18) are identical, so there are in effect five. Of these five, four contain disclaimers. None of the five maps shows Sipadan. Only one shows Ligitan, and then clearly a part of Semporna district. To suggest that the maps show the islands as not Malaysian is unsupportable.

5.22. Two other maps in Indonesia's Map Atlas should be mentioned. The first is the map showing continental shelf boundaries, which was annexed to the 1969 Agreement regarding the Delimitation of the Continental Shelves between the Two Countries.[28] The map shows Sabah internal provincial boundaries, with Sipadan (unnamed) lying outside those boundaries. It does not show Ligitan as such, but it does apparently show the provincial boundary as cutting the star-shaped reef on which Ligitan is located. It uses a different set of marks for international boundaries, and the international boundary on Sebatik stops at the east coast. The map contains a disclaimer. For the purposes of the present case it is neutral. This is hardly surprising since the present dispute arose during the negotiations for the 1969 Agreement, and at the time they signed the map, the representatives of Malaysia and Indonesia were fully aware of each other's claims to the islands.

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[27] See above, paragraphs 4.37-4.45, pp. 88-93.

[28] Annex IM 136, vol. 4. & IM Map Atlas, Map 17.

5.23. Secondly, there is the Malaysian map of Semporna, issued in 1968, which shows "Treaty Limits of the Republic of the Philippines Province of Sulu" (i.e., those resulting from the Treaty of 1930) as a red hatched line. The east-west parallel line, at about 4°20'N, bears the annotation "Republic of Indonesia".[29] The Map shows Ligitan and Sipadan as well as the other islands off Semporna. It contains a disclaimer. There are of course no islands in the area to the south of the red hatched line, so the meaning of the phrase "Republic of Indonesia" is quite unclear. If it was thought to reflect an allocation line, there are no islands to the south for it to allocate.

5.24. The map does not show any boundary between Malaysia and Indonesia. The only basis on which it might conceivably be thought to support Indonesia's case (leaving to one side the effect of the disclaimer) would be if the red hatched line at 4°20'N were to be extended to the west, in which event it would attribute to Indonesia not merely Sipadan and Ligitan but also Si Amil, Danawan, Mabul, Kapilai and part of the mainland as well.

5.25. If some of the Malaysian maps on which Indonesia relies are unclear, it remains the case that no single Indonesian map, so far as can be discovered, supports the Indonesian claim (any more than do the pre-independence Dutch maps). One important official Indonesian map has already been fully discussed: it is the map accompanying Indonesian Act No. 4 on its maritime boundaries.[30] Among other Indonesian maps, the following are illustrative.

5.26. The map "Kalimantan Utara", based on the "Internasional [*sic*] Map of the World" series, is believed to be the first Indonesian publication of this sheet, produced in Jakarta in 1965. It is clearly a copy of the 1941 map with some amendments, particularly to the spelling of names. The (rather crudely-drawn) border across Sebatik has been extended eastwards some 8 km across the sea. Sipadan and Ligitan are not affected. An extract from the map is shown as **Insert 14**, opposite page 112. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 8.

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[29] See IM Map Atlas, Map No. 15.

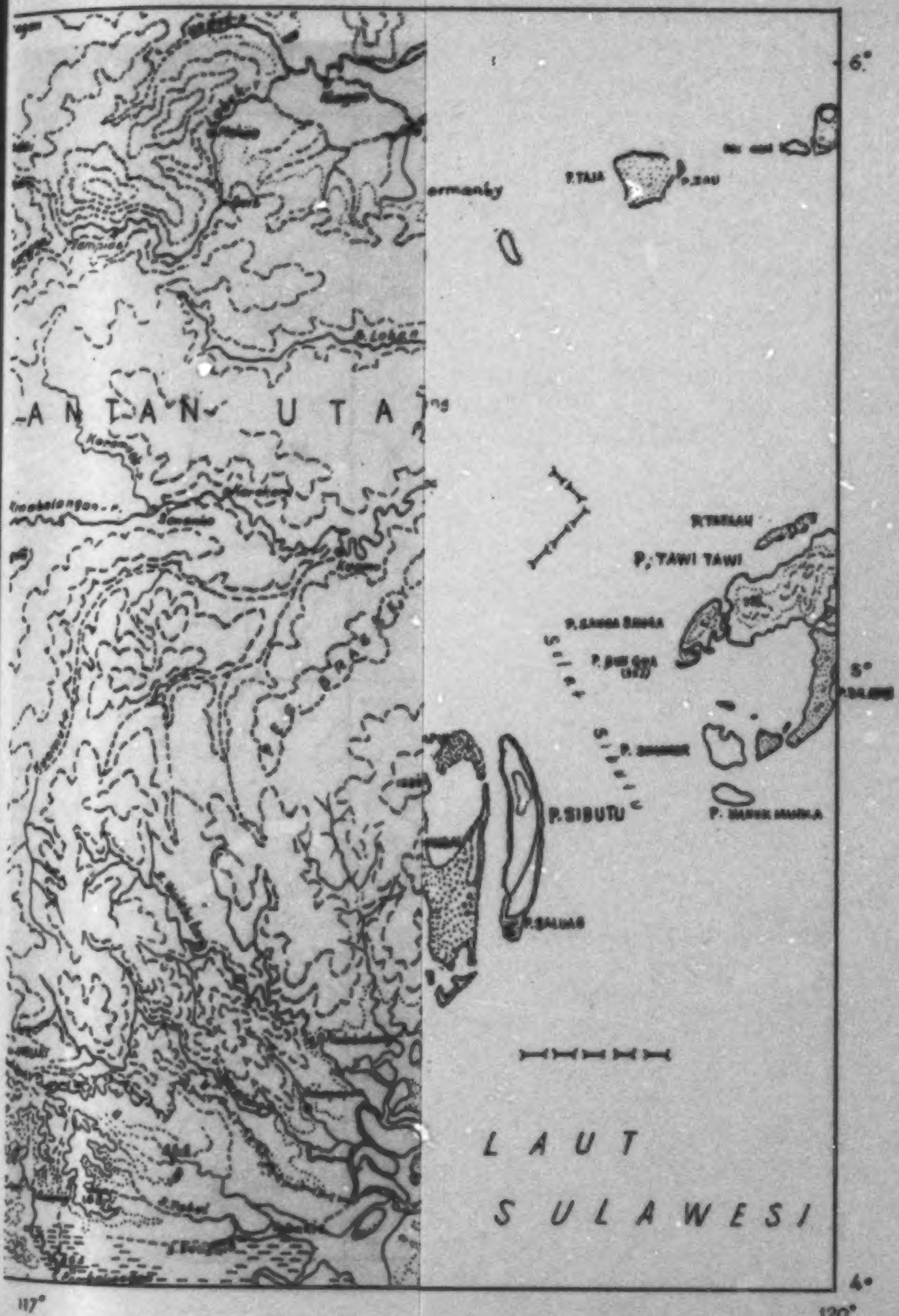
[30] See above for discussion, paragraphs 4.25-4.31, pp. 83-86.

5.27. In 1968, a new Indonesian edition of the same sheet was published. The even more crudely drawn boundary across P. Sebatik now extends only some 3 kms into the sea. An extract from the map is shown on page 114 as **Insert 15**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 9.

5.28. The 1976 edition of Sheet NB 50, "Bandar Seri Begawan", was printed in 1977 in full colour and has bilingual marginal information (English and Bahasa Indonesia). The boundary across Sebatik, drawn rather roughly as a curving line, now stops at the eastern shore of the island. An extract from the map is shown on page 115 as **Insert 16**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 10.

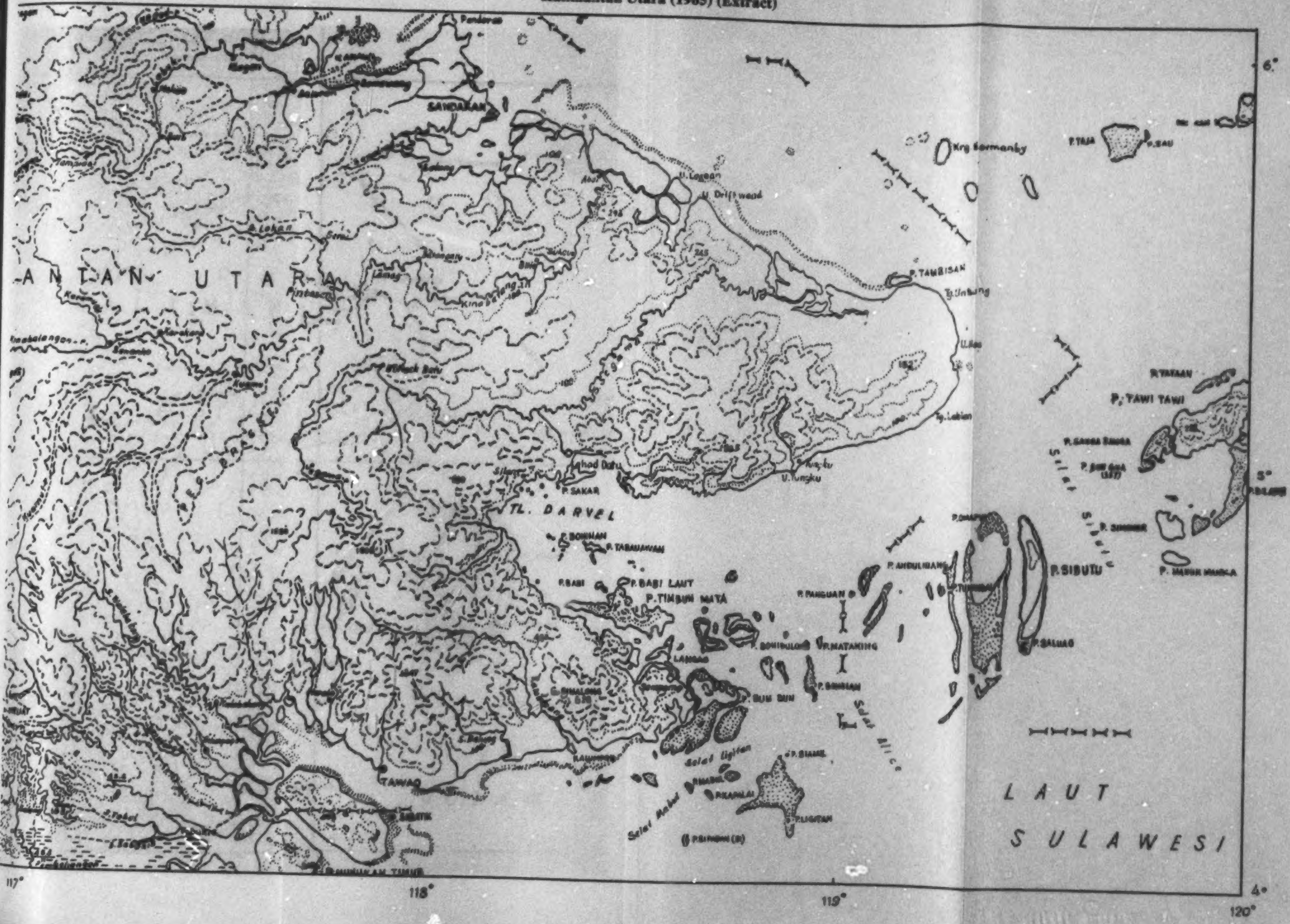
5.29. Then there is a map entitled "Sibatik. Land Systems and Land Suitability". This monochrome 1:250,000 map was produced jointly by UK and Indonesian land evaluation authorities in 1987 (see volume 2 of this Counter-Memorial, Map 11). Unlike the earlier Indonesian maps referred to in this section, it carries a boundary disclaimer. The straight-line boundary across Sebatik is extended some 12 to 13 kms across the sea. The islands offshore North Borneo are not shown.

5.30. Kalimantan 1:1,500, 000 is a large commercially produced general map of Kalimantan by PT Pembina, dated 1992/1993. This has a narrow red line extending (but not due eastward) across the sea from the eastern end of the boundary on P Sebatik. This line does not correspond to any boundary symbol in the key to the map. Neither Sipadan nor Ligitan is shown, but they would probably lie to the north of the narrow red line. An extract from the map is shown on page 116 as **Insert 17**. A photo-reduced copy of the entire map is in volume 2 of this Counter-Memorial as Map 12.


6°
ermanky
P. TAJA
P. SAU
ANTAN UTA
P. TAWI TAWI
P. SANGA SANGA
Selat
Sibutu
5°
P. SIBUTU
P. SALUAG
LAUT SULAWESI
4°
117°
120°

Insert 14

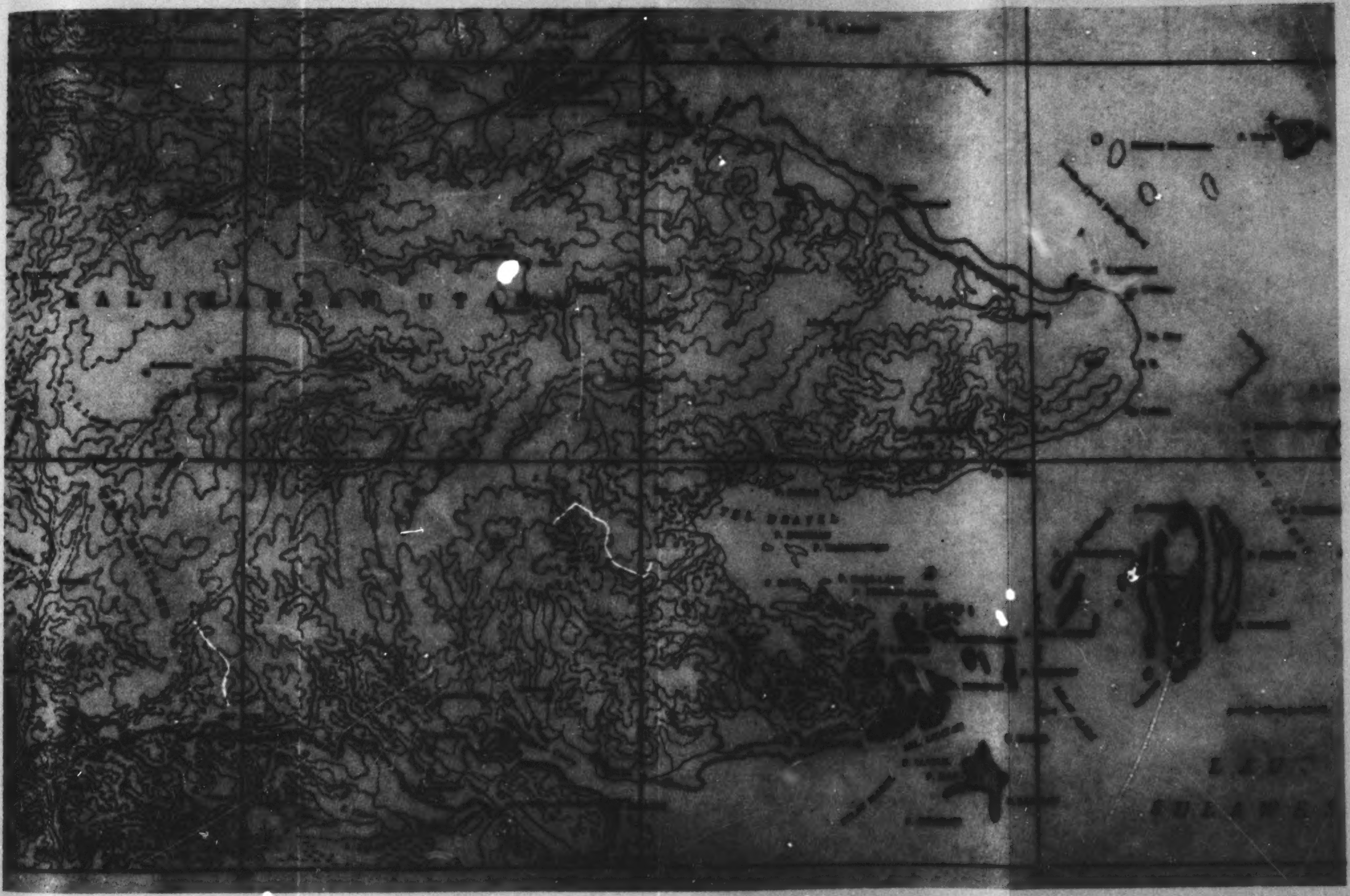
Kalimantan Utara (1965) (Extract)


Panderas
SANDAKAN
U. Logaan
U. Driftwood
245
296
108
ANTAN UTARA
Pintasan
Kinabatangan
Kinabalangan
Semando
Lamag
Tamasai
Silam
Lahad Datu
P. SAKAR
TL. DARVEL
P. BOHNAN
P. TABAUAVAN
P. BABI
P. BABI LAUT
P. TIMBUN MATA
LANGAO
P. BUM BUM
S. Balung
TAWAO
SEBATIK
Selat Ligitan
Selat Makal
P. KAPALAI
P. LIGITAN
P. SIAMIL
P. SIPADAN (B)
P. BOHIDULONG
P. MATAKING
P. PANGUAN
P. BOHEIAN
Selat Alice
P. ANDULINANG
P. SIBUTU
P. SALUAG
Selat Sibutu
P. SIMUNUL
P. MANUK MANKA
P. TAWI TAWI
P. TATAAN
P. SANGA SANGA
P. BONGAO (337)
P. BILATAN
Krg Barmanby
P. TAMBISAN
Tg. Unsang
U. Bas
Tg. Labian
U. Tungku
182
P. TAJA
P. SAU
LAUT SULAWESI
6°
5°
4°
117°
118°
119°
120°

KALIMANTAN
LAUT
SULAWES

Insert 15

Kalimantan Utara (1968) (Extract)


KALIMANTAN UTARA

[115]

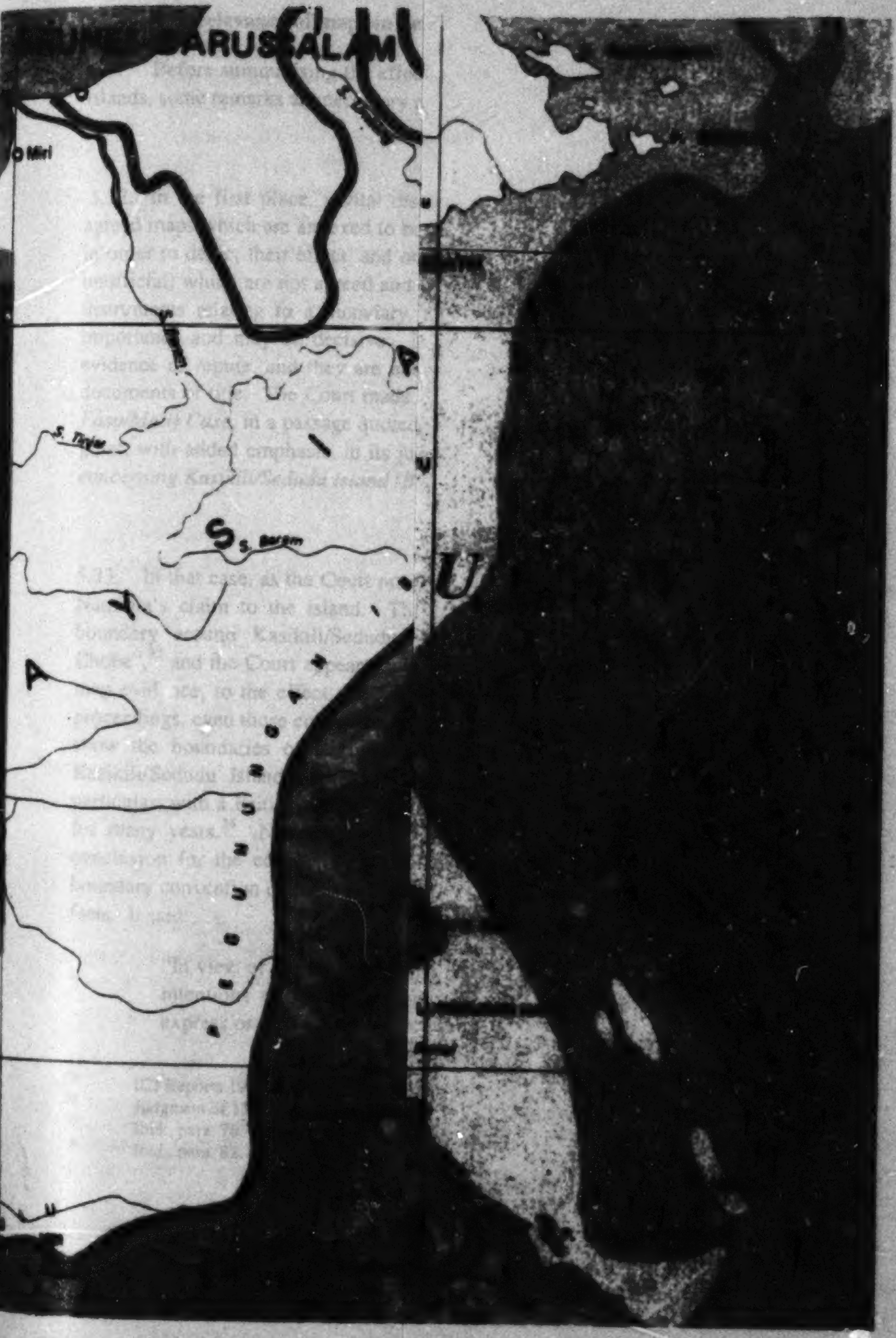
DARUSSALAM

SABAH
SULU
117°
118°

Insert 16

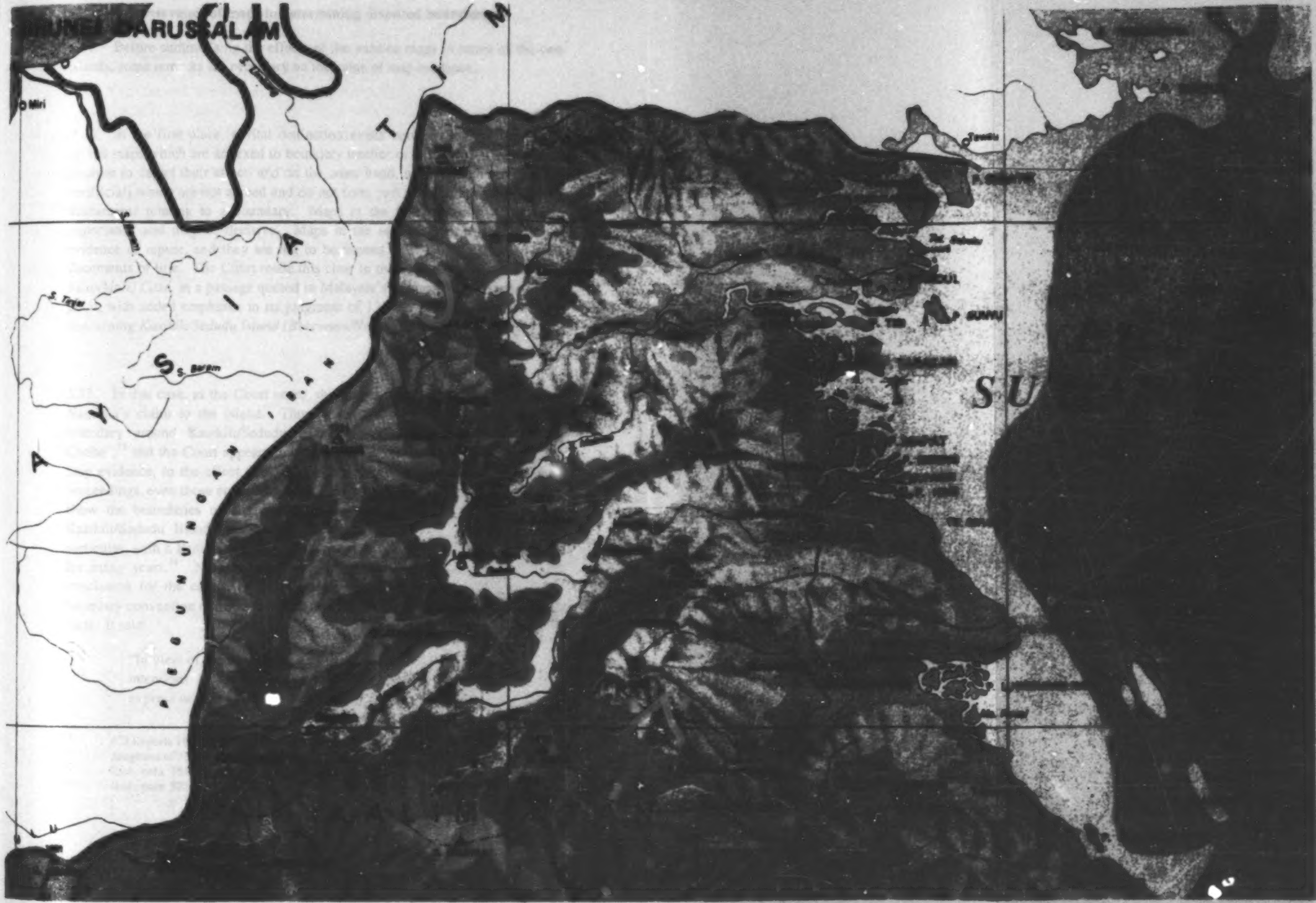
Sheet NB 50 "Bandar Seri Begawan" (1976) (Extract)

SABAH
117°
118°
119°


BRUNEI DARUSSALAM
Miri
S. Tinjar
S. Baram
SARAWAK
MALAYSIA
S. Baram

Insert 17

Kalimantan (1992) (Extract)


BRUNEI DARUSSALAM
Miri
S. Tinjar
S. Baram
SU

C. The relevance of maps in determining disputed boundaries

5.31. Before summarising the effects of the various maps in terms of the two islands, some remarks are necessary on the value of map evidence.

5.32. In the first place, a vital distinction exists between, on the one hand, agreed maps which are annexed to boundary treaties or demarcation agreements in order to depict their effect, and on the other hand, maps (whether official or unofficial) which are not agreed and do not form part of internationally binding instruments relating to a boundary. Maps in the first category are of great importance and may be decisive. Maps in the second category are, at best, evidence of repute, and they are not to be treated in any way as if they were documents of title. The Court made this clear in the *Frontier Dispute (Burkina Faso/Mali) Case*, in a passage quoted in Malaysia's Memorial.[31] It repeated the point, with added emphasis, in its judgment of 13 December 1999 in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*.

5.33. In that case, as the Court noted, the map evidence on balance supported Namibia's claim to the island. Thus "early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe",[32] and the Court appears to have accepted Namibia's summation of the map evidence, to the effect that "the majority of the maps submitted in these proceedings, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, tend to place the boundary around Kasikili/Sedudu Island in the southern channel".[33] This was the case, in particular, with a British map of 1933 which was "in general use" in Botswana for many years.[34] Nonetheless the Court declined to accept that any legal conclusion for the course of the boundary (based on the interpretation of a boundary convention of 1890 to which no map was annexed) flowed from these facts. It said:

> "In view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement between them or their successors

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[31] ICJ Reports 1986, at p. 582, quoted in MM, para. 10.1, p. 107.

[32] Judgment of 13 December 1999, para. 74.

[33] Ibid., para. 76.

[34] Ibid., para. 82.

> concerning the validity of the boundary depicted in a map (cf. *Temple of Preah Vihear*, Judgment, Merits, I.C.J. Reports 1962, pp. 33-35), and in the light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case. That evidence cannot therefore 'endors[e] a conclusion at which a court has arrived by other means unconnected with the maps' (*Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 583, para. 56), nor can it alter the results of the Court's textual interpretation of the 1890 Treaty."[35]

Evidently, a very high standard of consistency, certainty and general acceptance of the mapping history of a disputed area has to be met if non-agreed maps are to be relevant to title.

5.34. The Arbitral Tribunal in the first phase of the *Yemen-Eritrea Arbitration*, also considered the question of maps in support of territorial claims, and reached essentially the same conclusion. In reviewing the substantial map evidence adduced in that case it stressed in particular its reluctance "without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labelling".[36] More generally, it noted that even unequivocal (but non-agreed) maps adverse to one party or another were "as in all cases of maps, to be handled with great delicacy".[37] Its conclusion as to the map evidence overall was rather dismissive:

> "Then of course there are the maps. These islands are large enough to find a place quite often – though by no means always – on even relatively small-scale maps of the region. It is fair to assert that, thanks to the efforts of counsel and especially those of Yemen, the Tribunal will have seen more maps of every conceivable period and provenance than probably have ever been seen before, and certainly a very much larger collection than will have been seen at any time by any of the principal actors in the Red Sea scene. In fact, the difficulty is not so much the interpretation of a plethora of

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[35] Ibid., para. 87.

[36] Award of 9 October 1998, para. 382.

[37] Ibid., para. 388. See generally ibid., Chapter VIII for the review of the map evidence in that case.

> maps of every kind and provenance, as it is the absence of any kind of evidence that these actors took very much notice of, or attached very much importance to, any of them. The Tribunal is of the opinion that in quite general terms Yemen has a marginally better case in terms of favourable maps discovered, and looked at in their totality the maps do suggest a certain widespread repute that these islands appertain to Yemen."[38]

5.35. Indonesia asserts[39] that the official publication of a map is an estoppel by conduct. This is completely inconsistent with the discussion of the status of maps in the decisions of the International Court and other tribunals in the cases mentioned above, and is unsustainable in principle. Even if a map could be considered a representation by the State concerned of a legal state of affairs, for it to constitute an estoppel it would be necessary (a) that it was unequivocal; (b) that it was intended to be relied on; (c) that it was actually relied on, and (d) that the reliance caused detriment to the State so relying.[40] None of those prerequisites is met here, for a combination of the following reasons. First, there is no pre-1948 British or post-independence Malaysian map which attributes the islands to Indonesia; even if maps could constitute legal representations none of these maps do. Secondly, most of the Malaysian maps contain disclaimers, indicating that they were not intended to be relied on. Thirdly, there is no evidence whatever that Indonesia relied on any of the maps, or that it suffered any detriment.

5.36. But as a matter of international law, maps as such (not signed or endorsed by treaty or equivalent action by the States concerned) do not constitute representations of law. If they did, the mapping authorities of States, with their many and diverse internal functions, would have become the unacknowledged legislators of mankind in the matter of boundaries. Under international law they do not have such a role, and given the customary conflicts and inconsistencies in mapping in many parts of the world, it is inevitable that they do not. A series of unequivocal maps may constitute evidence of general repute, but none of the maps relied on by Indonesia is unequivocal. By contrast, the map annexed to the 1915 Agreement, especially when it is read with that Agreement, is unequivocal, and unlike any of the maps relied on by Indonesia, it is an agreed map focussing on the boundary as such.

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[38] Award of 9 October 1998, para. 490.

[39] IM, paras. 6.67-6.69, p. 123.

[40] For example, in the *El Salvador-Honduras Land, Island and Maritime Frontier Case (Application for Permission to Intervene)*, ICJ Reports 1990 p. 92 at p. 118 (para. 63), the Chamber referred to the following "essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it".

D. Conclusions from the map evidence as a whole

5.37. Applying these legal standards to the maps tendered to the Court, it will be seen that the maps on which Indonesia relies fall far short. As to Malaysia's official maps, Indonesia asserts that:

> "... Malaysian official cartography consistently depicted the extension of the 4°10' N line of latitude out to sea as the southern limit of Malaysia's territorial possessions in the area."[41]

This is simply not the case. As in the case of British maps concerning Bechuanaland/Botswana, there was no complete consistency. But it has been shown that none of the maps concerned attribute the islands to Indonesia. Moreover whenever Malaysia produced maps focusing on local use of the islands or actual regulation (e.g. in the context of its status as a native reserve for turtles or subsequently as a conservation zone) the islands are clearly and unequivocally shown as Malaysian.[42]

5.38. Turning to the maps more generally, Indonesia asserts that the map evidence is "consistent and compelling", shows "remarkable consistency", and is "clearly confirmatory of its title".[43] This is a remarkable assertion, considering that Indonesia has produced not a single Dutch or Indonesian map, on any scale, which shows the islands and attributes them to Indonesia. On the contrary, the Dutch maps of 1897-1904 and of 1914 clearly show the boundary terminating at the east coast of Sebatik and thus attribute them to British North Borneo. The Indonesian official archipelagic claim map of 1960 clearly does not treat them as Indonesian, when it would have been very much in Indonesia's interest to do so. Even Indonesian maps since 1969 do not show the islands as Indonesian. Moreover, of the comparatively few modern maps which might be interpreted in a contrary sense, each of them contains a disclaimer. Mostly these maps do not show the islands at all, or (for the earlier maps) show them in the wrong place, and even if they are not shown as Malaysian they are not shown as Indonesian either.

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[41] IM, para. 6.74, p. 125.

[42] See e.g. MM, Annexes, vol. 5, Maps 13 & 18.

[43] IM, paras. 6.77-6.79, p. 126-127.

5.39. Malaysia's claims to the islands depend on the chain of title by which they were acquired from the United States as successor to Spain and from its long, peaceful and uninterrupted administration, extending back to the period of the BNBC after 1878. It does not depend on maps. But the preponderance of the map evidence — and especially the 1915 map — supports Malaysia's case, and this is in stark contrast to the fact that no single Dutch or Indonesian map, to the present day, shows the islands as Indonesian. In fact, as we have seen, the Dutch and Indonesian maps are unequivocal and entirely consistent; no reader of those maps would think the two islands are claimed by Indonesia or are part of Indonesian Kalimantan.

SUBMISSIONS

In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

Datuk Abdul Kadir Mohamad
Agent of Malaysia

Kuala Lumpur

2 August 2000

APPENDIX 1

The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)

by

Prof. dr. Vincent J. H. Houben

The Regional History of Northeast Borneo in the Nineteenth Century

with special reference to Bulungan

Prof.dr.Vincent J.H. Houben

1. Purpose of this Report

1.1 As a professor of Southeast Asian history, with a specialisation in nineteenth century Indonesian history, I have been asked by the Government of Malaysia to provide an independent expert report on the East Borneo region in the latter part of the nineteenth century, commenting in particular on the status of Bulungan and its relations with the maritime zone. To this end I was given copies of the Indonesian and Malaysian Memorials on the Sipadan & Ligitan dispute. As these proved to reflect only part of the historical material available, additional materials were retrieved during research undertaken in the Dutch General State Archives in The Hague. Also I have reviewed additional literature not mentioned in the Memorials of both States (see the attached Bibliography). This report aims to provide a balanced insight into the regional history of East Borneo area in the period prior to the conclusion of the Boundary Convention of 1891, based on accepted methods of scholarly historical interpretation.

1.2 For almost twenty years I have been involved in academic teaching and research concerning Southeast Asian history, in particular Indonesia. During my MA study at Leiden University, which I started in 1976, I specialised in Indonesian history including two of its major languages, Indonesian and Javanese. Between 1982 and 1987 I wrote a doctoral dissertation at the same institution on the mid-nineteenth century history of the indigenous states of Yogyakarta and Surakarta. From 1986 until 1997 I was attached to Leiden University as a (senior) lecturer in Southeast Asian history. in 1997 I was appointed as ordinary professor of Southeast Asian studies and head of Department at Passau University, Germany. Over the years I published several books and numerous articles in my field of specialisation and I am internationally recognised as a historian of Southeast Asia. A full CV is attached to this report.

2. General background: European presence in the region in the nineteenth century

2.1 European expansion in island Southeast Asia was a complex process involving several European actors and a great multitude of indigenous polities that interacted in various manners in different locations. Dutch colonial expansion in the Indonesian archipelago in the nineteenth century was built upon the experiences of the Dutch East Indies Company (1602-1800), but cannot be viewed as a mere continuation of it. From 1795 until 1814 a contraction of Dutch colonial power took place, as the Netherlands was incorporated into the French Napoleonic empire and thus became the enemy of the English, whose navy was in control of the seas after the Anglo-Dutch war of 1780-1784. In fact England annexed most of the Dutch possessions in Asia, including its main power base in Java. After the Convention of London of 1814, the Dutch were handed back most of their colonial territories in Asia, but Anglophobia remained present among Dutch officials throughout the nineteenth century. Effective Dutch control was restored in a number of main ports outside Java, but this proved to be a tedious process necessitating several military expeditions. In 1825, the Dutch colonial possessions in the Indonesian archipelago consisted of Java, the Moluccas, Banka, Timor and a number of coastal towns on the islands of Sumatra, Borneo and Celebes. In the island of Java a major Dutch-Javanese war erupted in 1825, which the Dutch could only win with great difficulty in 1830.

2.2 After 1830 the Dutch concentrated on the economic exploitation of Java, whereas in the Outer Islands the *status quo* had to be maintained. *Abstention* was made a leading principle of Dutch policy, strongly supported by the Colonial Office in The Hague and the centre of administration in the colony headed by the Governor-General of the Netherlands East Indies in Batavia. Local officials in the Outer Islands who broke this rule were even threatened with dismissal. Commissioner Governor General J. van den Bosch wrote in 1834:[1]

> "Apart from Banka, Banda and I think for the time being also Sumatra, all the other possessions are trouble spots (*lastposten*) [...] it is advisable to cut down the infrastructure of those posts to the smallest size and the slightest costs, to liberalize altogether the trade there for our citizens and to make every effort to exploit and protect Java, Sumatra and Banka."

Only occasionally was the policy of abstention interrupted, particularly when foreign intrusions into the Dutch sphere of influence were feared.

2.3 From 1894, the conquest of Lombok, until 1910 the Dutch made final advances to the Outer Islands. This signalled the end of the official policy of abstention, which subsequently became replaced by modern imperialism, a systematic extension of formal rule in all the areas that were considered to be part of the Netherlands East Indies. The colonial boundaries drawn at the end of the nineteenth and early twentieth centuries are identical with the boundaries of present-day Indonesia.

2.4 Colonial rule was exercised either through direct rule by European colonial officials or through a system of indirect rule. In the latter case indigenous leaders could retain their power, while at the same time being bound by contract to the colonial State. This was the rule in the Outer Islands, since through this system formal rule could be maintained in conjunction with the virtual absence of exercise of effective Dutch power, thus lowering administrative and military costs to a substantial degree. At the same time the indigenous ruler was forbidden to act independently on the international stage: all foreign relations were to be conducted by the Dutch themselves. During most of the nineteenth century each indigenous ruler had his own individual Contract with the Dutch; amendments were mostly made in case of a succession. In 1898 a standard agreement, the so-called Short Declaration, was introduced, by which any given indigenous ruler was compelled to relinquish all rights in favour of the Dutch. This signified that the Dutch were willing and able to dictate the terms of their relationship with indigenous rulers, whereas earlier during the nineteenth century this had not been the case.

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[1] Van den Bosch as quoted in Colijn Vol.I (1909-1914) 2-3. Translated from Dutch.

3. Dutch policies with respect to East Borneo

3.1 Borneo had long been an almost forgotten island. The Outer Islands as a whole were peripheral to the Dutch, but Borneo was a periphery within the periphery. Its status was unclear under the first Sumatra Treaty of 1824, it was not known as a resource-rich region and its interior was unknown until the early decades of the twentieth century. Dutch interference with Banjarmasin in the south dated from the seventeenth century, but at the beginning of the nineteenth century nothing was left of this. As Kielstra, a Dutch expert during the colonial era, pointed out: "the whole of Borneo was independent around 1810".[2] Regaining a foothold in Banjarmasin after the British Interregnum proved to be far from easy: in 1817, a Contract was concluded but afterwards tensions erupted with the Sultan, resulting in a situation in which the Dutch Resident was no more than a political agent: a "living coat of arms to protect Dutch sovereignty towards foreigners".[3] A major war erupted in Banjarmasin in 1859, which lasted until 1863. From the hinterland resistance was continued even up to 1905. The situation with regard to Pontianak and Sambas (West Borneo) was not much better. Nominal subjugation of the Sultans in the area could not prevent a major military confrontation with Chinese mining communities, which lasted from 1850 until 1855.

3.2 Abstention was the leading principle of Dutch policy with regard to Borneo. In 1843 Minister J.C. Baud expressed this as follows:[4]

> "With regard to Borneo the principle has been adopted in the last few years to limit ourselves to the occupation of Sambas, Pontianak and Banjarmasin,

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[2] Kielstra 1920: 187.

[3] Kielstra, 1920: 188.

[4] Baud as quoted in Dutch in Colijn Vol.I (1907-1914) 31.

> without further attempting to intervene directly in the administration of the interior nor trying to expand our authority in those regions."

As is clear from the standard work of Irwin, Borneo became a theatre of Anglo-Dutch rivalry.[5] In this respect it is very important to note that there were two clearly marked periods of Dutch activity on Borneo, one in the mid-1840s and another from 1877 onwards. Both episodes of Dutch action, which were in clear deviation from the official policy of abstention concerning the Outer Islands, were essentially reactions against what was perceived as an acute English threat. In West Borneo, provoked by the activities of James Brooke in Serawak and on Labuan, the Dutch decided to peg out their claims. Writing on the sequel to these activities, Fasseur notes that ambitious plans for the opening up of vast Borneo were developed, but that the Government of Borneo as established in 1846 remained an "administrative castle in the air" to be silently abolished several years later.[6] The *Journal de la Haye* of 15 February 1847 stated that Holland certainly did not claim the whole of Borneo, since it did not develop rights on territories of the Sultan of Brunei, the Sultan of Sulu "and on all islands alongside the Northcoast of Borneo".[7]

3.3 The Brooke concession also gave rise to some Anglophobia in Dutch governmental circles. The administration sought to bar foreign adventurers from areas that, although under Dutch sovereignty, were hardly known even off the coast. The Minister of Colonies, J.C. Baud, deplored that the Dutch did not even have an accurate survey of the islands and peoples that could be considered to be under Dutch rule. The British had pressed the Dutch for such a survey in connection with action by British naval ships against sea pirates in coastal waters, action that every now and then demanded punitive expeditions against their bases on land. Baud thought that the Dutch could make use of such a complete survey in order to fill any existing gaps in the sovereignty rights acquired, but this should be done silently and cheaply, for instance by the distribution of Dutch flags and coats of arms to indigenous rulers.[8] In contracts with native rulers, in which these acknowledged Dutch sovereignty, the largest possible territory should be defined. In the background was a hidden agenda:

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[5] Irwin 1955.

[6] Fasseur 1995: 55-56, at p. 55.

[7] W.A. Baud 1983, vol.III: 150-151.

in private conversations with King William II, Baud cherished the hope that a part of the colonial possessions could on occasion be sold to a European power, for instance France or Belgium. This can be compared with later plans of the Minister of Colonies, Mr. J. Loudon, in 1873 to sell the western part of New Guinea to Italy.[9]

3.4 Pre-1890 activities closer to the North Borneo frontier were essentially of a reactive nature, like in the mid-19th century. The activities of Erskine Murray in the Sultanate of Kutei, formally under Dutch sovereignty since 1825, raised alarm on the Dutch side. In Berau, more to the north, Edward Belcher tried to get a foothold. Both persons failed where Brooke had succeeded. However, they did trigger a more active Dutch policy in the region, seeking to secure nominal title by renewed contracts with the local Sultans. The situation on Borneo's east coast was summarised in a 1938 standard work on Dutch colonial history. After a lengthy account of the disturbances in the relationship between the Dutch and the Sultanate of Banjermasin, E.S. de Klerck stated:[10]

> "In 1824, a treaty was concluded with Kota Waringin, ceded to the Company in 1789 by the Sultan of Banjermasin, which treaty was to be renewed in 1878. In 1825, permanent relations were entered into with Kutei, a former prosperous Hindu colony. Murray's miscarried attempt to settle in that Sultanate in 1844 led to a military expedition, which resulted in a treaty with the above-mentioned state. Sambiliung and Gunung Tabur, which formerly formed one realm, called Berau, belonged to Banten up to 1788 and was afterwards ceded to the East India Company. However, it was not before 1834 that these petty states acknowledged the supremacy of the Government. In 1850 the relations between the latter and these states were finally settled by treaty. Bulungan, like the other states above mentioned played no role of any importance."

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[8] Fasseur 1995: 64.
[9] Lindblad 1989: 3; on Belgium, see: Martin 1866.
[10] De Klerck 1938 (reprint 1975): 309.

3.5 The grant by the Sultan of Sulu to Dent and Overbeck in 1878 again provoked increased activity on the part of the Dutch. A recent study on the regional history of Southeast Kalimantan contains the following description of events:[11]

> "The arrival of British fortune hunters in Sabah in 1878 formed the second chain of events that called for a more vigorous policy. It awakened the Dutch government to its self-assigned task in the scantily surveyed north-east. Contracts were instantly concluded with the sultans of Bulungan, Gunung Tabur and Sambaliung and soon a small warship cruised the waters of St Lucia Bay, where the border between Dutch and British spheres of influence supposedly ran. The official recognition of the British North Borneo settlement as a chartered company in 1881 motivated the permanent stationing of a Dutch district officer, in the border area. Geologists from the Bureau of Mines traversed the sultanates, and before long the increasing attention on the part of private capital called for a more impressive demonstration of colonial authority in these autocratic indigenous states. But the forest was thick and land abundant and the Anglo-Dutch border dispute remained unsettled for years at length."

3.6 Central Borneo remained an area of little interest to the Dutch colonial administration. As late as 1890 the Dutch Assistant-Resident even suggested that the Apo Kayan-area ought to be ceded to Serawak. Alarm was raised when the Dutch realised that Brooke's influence reached beyond the borders of Serawak. The need to show the flag was the major reason behind the expeditions of C. Nieuwenhuis of 1894, 1896-97, 1898-1900 to Central Borneo.[12] Only by 1909 were Bulungan, the Tidung and other lands visited regularly.[13]

3.7 In one particular area of colonial activity the Dutch and English collaborated rather than entering into competition: this was the problem of sea piracy, which often involved the slave trade as well. Slavery itself was forbidden in the Dutch East Indies since 1863, and the combat against sea pirates had started much earlier. It was the task of the governmental navy (*Gouvernementsmarine*) to patrol the archipelago in order to guarantee safe passage for western ships. B.H.M. Vlekke, author of another standard survey history of the Dutch East Indies, wrote:[14]

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[11] Lindblad 1988: 123.

[12] Nieuwenhuis 1900.

> "Sea piracy regularly occurred on all seas of Indonesia. One punitive expedition after another was directed against the pirates of Tobelo in the Moluccas, against the radjas of Borneo's Eastcoast, against the Acehnese and even against the Moros of the Philippines, although these stood under Spanish sovereign authority."

4. Bulungan as an indigenous Sultanate on the East Coast

4.1 The regional history of Bulungan can best be reconstructed on the basis of 19th century European travel accounts (Hageman 1855, Von Dewall 1855), official colonial documents (particularly the Memoranda of Transfer, made up by local Residents, existent since 1877, and Mail reports), and literature on Malay state formation.

4.2 The existing literature on Northeast Borneo is unanimous in depicting Bulungan as a small entity. Jerome Rousseau describes Bulungan as a pre-colonial coastal state, with limited interaction with the inland Dayak peoples of the Kayan and Pujungan rivers.[15] The lower Kayan River itself was called Bulungan.[16] Clifford Sather defines Bulungan together with Berau as "petty kingdoms" on the east coast of Kalimantan.[17] James Warren circumscribed Bulungan and Berau as "tiny realms".[18]

4.3 From these denominations it is clear that Bulungan cannot be equated with major neighbouring indigenous states such as the Sultanates of Brunei and Sulu. Sulu, for instance, is characterised in the specialist literature as a segmentary state,

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[13] Rousseau 1990: 33-34. A close study of the Memoranda of Transfer and Mailreports of the late 19th and early 20th century confirms this.
[14] Vlekke 1947: 341-342. Translation from Dutch.
[15] Rousseau 1990: 10.
[16] Rousseau 1990: 21.
[17] Sather 1997: 30.
[18] Warren 1981: 10.

which involves a duplication of organisational forms at different state levels (central-regional-local). Warren, the most important expert on Sulu history, writes on the nature of this and similar indigenous polities: [19]

> "Territorial dominion, a system of specialised offices, and a political hierarchy exercising some control over the use of force in the area of alleged dominion were implicit in the genesis of such traditional states (Sultanates) as Sulu, Cotabato, Brunei, and Kutai."

4.4 Bulungan, on the other hand, was a small Malay Sultanate, analysed by A.C. Milner in his book *Kerajaan* (1982) as follows:

> "Just as the Malay state lacked governmental or legal structures, so it differed from Western states in its geographical definition. Territorial borders were often unknown [...] The actual location of the Malay state, in fact, appears to have been a matter of little importance. [...] The Malay word often translated loosely as 'government', 'state' or 'kingdom' was *kerajaan*. [...] *kerajaan* connotates little more than 'being in the condition of having a Raja'."

In other words, the Malay Sultanate as a political entity was very weak, except when it developed into a major polity like Malacca.

4.5 Sulu and Bulungan were therefore entities of a different kind. It is clear that in pure scale Bulungan was tiny compared to large entities like Sulu and Brunei. Bulungan cannot be ranked as a segmentary state in the sense of a reduplicated organisation of persons but it did in fact develop particular territorial claims. Crucial is ultimately to what extent these claims could be validated by actual exercise of power. The range of power of Bulungan was very modest, as were the possibilities of the local Sultan to exercise real power.

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[19] Warren 1981: xxii.

4.6 Before 1800 Bulungan had been part of a bigger realm called Berau, that also included Sambaliung, Gunung Tabur and, conquered by the Malays, the Tidung lands. Around 1800 Bulungan became its own polity, separate from Berau. Only just before the conclusion of the first treaty with the Dutch in 1850, Bulungan was recognized by them as a separate Sultanate. The seat of the Sultan was Tanjung Palas at the left bank of the Kajan River, which by 1849 housed 2,000 to 3,000 people.[20] On the opposite bank of the river, at Tanjung Selor, local Dutch officials installed themselves. Berau, Sambaliung and Bulungan constituted different political entities, each under its own Sultan, with which the Dutch government concluded separate treaties. The Tidung lands were supposed to belong to Bulungan, whereas Gunung Tabur and Sambaliung belonged to Berau, situated to the south of Bulungan.

4.7 The composition of Bulungan society was complex. Besides Malays one could find Dayak, Tausug (from the Sulu Archipelago) and Bugis (from South Sulawesi). The last-mentioned intermarried with prominent families and were assimilated.[21]

4.8 The coastal Sultanates of Kalimantan, to which Bulungan belonged, claimed larger areas than they could effectively control. According to Rousseau:[22]

> "While small and relatively weak, coastal sultanates had the trappings of states: they defined themselves as regional polities with a territory which in theory they controlled exclusively, and they had the right to impose taxes. [...] In practice, Borneo sultanates had a coastal nucleus: the areas close to the capital were under actual control of the Sultan and his followers, and were taxed on a regular basis. The state also controlled and taxed the trade that passed through this area. These small principalities did not effectively control all the territory which they nominally claimed, and they were often politically unstable."

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[20] Dewall 1855: 429.

[21] Warren 1981: 10. Tausug were a class of traders from the Sulu realm. Bugis/Buginese conducted maritime trade throughout the archipelago and came originally from South Sulawesi.

[22] Rousseau 1990: 284.

4.9 The extent of actual power by the centre in Bulungan was largely dependent on the individual capacities of each individual Sultan and was therefore subject to variation. In 1880, the Sultan of Bulungan was described by the Dutch as a weak, old man with almost no influence, wrestling with an elite connected to slave trade.[23] In 1894, Resident Joekes noted that Sultan Mohamad Alimuddin was an insignificant personality, causing the nobility to do as they pleased.[24] In 1916, Resident Rijkmans observed that the young Sultan of about 37 years old was physically unsuited for his position and that the actual administration was taken care of by datu Mandur.[25] In 1921, the Sultan was identified as someone of Dayak descent, a man who in the delta of the Bulungan river exercised some authority and had made big money from the Tarakan oil concessions.

5. Dutch interference with Bulungan

5.1 A close reading of the Memorials of Transfer by the local Residents clearly shows that the Dutch presence in the area was limited throughout the nineteenth century. In the Dutch Memorial of Transfer of 1877, Bulungan was classified as an entity under contract with the Netherlands East Indies. However, it did not belong to those areas where the Dutch appointed the head of government. Bulungan can therefore be classified as an indirectly ruled area. The first Contract of 1850 was followed by a second one in 1878, that was meant to further consolidate Dutch prestige and contained clauses regarding the prevention of sea piracy and debt slavery.

5.2 On land, local Dutch administration was arranged for in 1877, after the Assistant Resident of Kutei & Eastcoast Borneo had undertaken a journey of inspection along the East coast, to be followed by other journeys later on. In 1879, the Assistant Resident of Kutei was sent northwards, looking – sometimes in vain - for local heads from whom could taken down written statements that they considered to be under the authority of Bulungan. In 1882, a Dutch controller was stationed at Muara Tawau in St. Lucia Bay. This officer was then moved to Bulungan in 1889. A major issue in the Dutch documents at the time was the identification of the northern boundary of Bulungan, important because Dutch and British claims, based on their contracts with, respectively, Bulungan and Sulu, overlapped. Nowhere in the Dutch colonial documents was the issue of a sea-boundary discussed.

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[23] MoT 2 March 1880, ARA microfiche 267-2.
[24] MoT 22 April 1894, ARA microfiche 269-1.
[25] MoT 3 June 1916, ARA microfiche 271-1.

5.3 Increasing Dutch interference was not entirely uncontested. In 1921 the Sultan of Bulungan protested against the Short Declaration being forced upon him, even went to Holland to plead his case before the Minister of Colonies and retained his opposition until his death in October 1924.[26] In 1921 Resident Hens made clear that the Dutch colonial authorities, in their contacts with Bulungan, had systematically served their own needs against the English: "Nominally has the whole region, nowadays called the Boeloengan region, been considered to stand under the authority of the Sultan, not because he exercised any but because we had to prove our claims against those of British North Borneo and Serawak (border treaty)".[27]

6. Bulungan relations with maritime areas

Bulungan authority in the coastal strip

6.1 No fixed boundaries existed between the Sultanates bordering the coasts. According to local indigenous notions, a particular river basin (up to the watershed) constituted a political-economic unit. Between these basins often existed unclaimed forested or swampy lands. Trading systems normally were configured to river basins, although political considerations could induce people to cross watersheds.[28] Disagreements about claims of overlordship could, however, lead to tense relations between neighbouring states.

6.2 The existing primary and secondary sources provide no firm conclusions as to where Bulungan's power ended in northerly direction along the coast. Bulungan controlled principally the lower Kayan River basin. The status of the Tidung lands to the north, which comprised the basins of the Sibuku and Simengaris Rivers, was at the time unsettled. The economy of the Sibuku area was firmly linked with that of Sulu and was controlled by Taosug and Bugis traders. Warren wrote: "These trade centers were sometimes tributary to the Bugis, sometimes to the Taosug, and when occasion permitted sometimes independent of the authority of their stranger overlord."[29] Bulungan and Berau as a whole seemed to have been until as late as 1830 "distant Bornean dependencies" of Sulu.[30] This observation is confirmed by the statement of Von Dewall in 1855 that north of Berau the coast was under Sulu rule, apparently a gift of Brunei for its help in an internal conflict.[31] Later the status of Bulungan and Berau vis-à-vis major states in the area is unclear, but it can be assumed that they acquired a more independent status.

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[26] 1924, Secret Appendix to MoT 1921 and subsequent MoTs.
[27] MoT 1921, ARA microfiche 273-1+/2.
[28] Rousseau 1990: 288.

Trade relations between Bulungan and the maritime zone

6.3 Northeast Borneo was the core of the Sulu Sultanate's procurement trade. Sulu datus settled at river mouths, in bays and on coastal islands along the coast stretching from Maruda Bay to Bulungan.[32] In this trade slaves were exchanged for tripang, bird's nests, wax and other forest products. Taosug and Bugis middlemen who settled in the area dominated this trade. Yet, at the same time Warren adds that: "On the Sibucco, Sambakong, and Bulungan river the Sultanate's [i.e. Sulu] hegemony and trade were still plainly visible."[33] After the middle of the 19th century the trade, and thus Sulu's hegemony, declined: Warren states that until 1860 Bulungan's trade was dominated by the Sulu Sultanate.[34]

6.4 In the mid-19th century direct trade between Sulu and Tidung fell off due to several reasons. Direct trade was apparently forbidden and relegated to Bulungan, once the Spanish erected a blockade of Jolo in the Sulu Archipelago.[35] Also, after the middle of the 19th century western naval presence in the region increased. Despite this, lucrative trade relations existed between Bulungan and Bajau people from the

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[29] Warren 1981: 85.
[30] Warren 1981: xx.
[31] Von Dewall 1855: 425.
[32] Warren 1981: 75.
[33] Warren 1981: 85.
[34] Warren 1981: 87.
[35] Von Dewall 1855: 427.

Sulu Archipelago, who regularly landed with their boats on the shore to exchange slaves for forest products. Trade with the Bugis existed as well. The Bajau people were experienced seamen, whereas, as local oral tradition confirmed, the people of Berau never dared to move out on to sea. Likewise Bulungan did not possess its own perahus. During a famine in 1879 several thousand slaves were apparently taken to Bulungan from the Sulu Archipelago.[36] In 1880 Resident Meijer refers to the slave trade of the northerly realms of Berau and Bulungan, where the trade with the inhabitants of the Sulu Archipelago consisted of exchanging products against robbed human beings, that were being sold in Dutch territory.[37] Thus Bulungan itself started to play a central role in the slave trade of the region.

6.5 No historical sources indicate any relations between Bulungan and the islands of Sipadan and Ligitan. Dinawan/Danawan-island in the Semporna district was the main centre from which relations between the Bajau and the outside world were maintained. This island lies near the edge of the main Bajau Laut fishing grounds, i.e. the Ligitan reefs. Von Dewall stated that in 1849 Bajau boats came from Dinawan and established themselves further down the coast, while 50 other boats settled in the islands of Berau.[38] The Semporna Bajau Laut oral tradition claims that they have made regular voyages until the 1920s to the areas of eastern Kalimantan referred to by Von Dewall. Semporna was developed as a market centre by the BNBC from the mid-1880s onwards.

7. Conclusions

The main points of this historical report might be summarised as follows:

i. From 1830 to 1894 the Dutch concentrated their colonial efforts on Java, whereas in the Outer Islands a policy of abstention was pursued. With regard to Borneo, the Dutch displayed sudden activity twice, reacting to the activities of Brooke, Murray and Belcher in the 1840s and to the 1878 Sulu grant to Dent & Overbeck. On those occasions they tried to assert their territorial claims with

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[36] Warren 1981: 199-200.
[37] MoT Meijer 2 March 1880, ARA microfiche 267 1+ and 2.
[38] Von Dewall 1855: 445-447.

regard to what they considered to be their spheres of influence. Contracts with local power holders were part and parcel of such policy.

ii. Dutch colonial interest in the maritime zone was rather limited. Combating sea pirates and slave trade was the main issue, for which collaboration with the English was sought.

iii. The Sultanate of Bulungan was a small Malay coastal Sultanate with limited territorial reach. Until the middle of the nineteenth century, the Tidung lands to the north of Bulungan seem to have been dominated by Sulu and Bugis traders. Afterwards Bulungan seemed to have developed into the central slave market of the region despite increased naval patrols by both the British and the Dutch. Bajau from the Semporna area played most likely a central role in this slave trade.

Prof.dr.V.J.H. Houben
28 May 2000.

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CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

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COUNTER-MEMORIAL OF MALAYSIA

VOLUME 2

2 AUGUST 2000

Annex MCM 1

J.P. MACLEAR (COMP.), *EASTERN ARCHIPELAGO, PART I (EASTERN PART)* (LONDON, HYDROGRAPHIC OFFICE, ADMIRALTY, 1890) PP. 182-191

8

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CELEBES SEA, N.E. COAST OF CELEBES, MOLUCCA AND GILLOLO
PASSAGES, BANDA AND ARAFURA SEAS, N.W. AND WEST COASTS
OF NEW GUINEA, AND NORTH COAST OF AUSTRALIA.

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long sandy beach in the bay bears W. by S., when it may be steered for, anchoring as convenient.

Supplies.—There is no village in Dent haven, but natives occasionally visit the place. Fish may be obtained with the sein near the beach southward of the southern stream. Bathing is dangerous on account of alligators.

Tides.—It is high water, full and change, at Dent haven during the period of the south-west monsoon at 6h. 34m., and at Tambisan island at 10h. 52m.; springs rise 3½ feet. At Kinabatangan river at 11h. 17m.; springs rise 5½ feet, neaps 4 feet. Between Sandakan and Tambisan the flood stream sets to the north-westward and the ebb to the south-eastward; the tidal stream is slight, rarely as much as one knot.

At the distance of 10 miles from the coast, during the south-west monsoon, the regular south-east current, from one to 2 knots an hour, makes itself felt, and the north-westerly (flood) set is not experienced, only a slackening of the current during flood tide.

Between Tambisan and Dent haven the tidal streams are more strongly marked; the flood sets to the northward and the ebb to the southward at the rate of from 2 to 3 knots per hour.

Tide rips.—From Gem reef to Sibutu passage frequent and sharply-defined tide rips occur, which have the appearance of shoal water.

SIBUTU ISLAND, the north end of which is in lat. 4° 54′ 40″ N. long. 119° 27′ E., lies W. by S. ¾ S., about 18 miles distant from the Observation islet south of Bongao; it runs nearly north and south and is about 14 miles long, with an average breadth of 2 miles.

With the exception of the single peak on the east coast, which has an altitude of 524 feet and is a perfect cone, the island is flat and densely wooded.

A reef fringes the coast, and then runs nearly 8 miles south of its southern point, when it trends to the westward; this reef is dry at low water, and has numerous boulders, sand cays, and blocks of coral on it, while there are some small islets covered with trees near its south-west extreme. This reef is steep-to all round, and there is no anchorage; but a ship might stop a tide by dropping her anchor in 15 fathoms due north of the island, when she would swing round within three-quarters of a cable of the fringe reef.

Tides.—It is high water, full and change, at 6h. 50m.; springs rise 5 feet. The flood and ebb streams run for 3 hours after high and low water.

Omapui and Tumindao.—From 2 to 2½ miles west of Sibutu a chain of islets and reefs runs to the southward and parallel to it, leaving a deep channel between Sibutu and these islands; but as the southern part of this channel with the islets and reef have not been examined, no one should venture to use it, especially as the passage between Simonor and Sibutu is 18 miles wide, leaving plenty of working room, and apparently free from danger.

From the north-east point of Omapui the reef trends to the north-west for about 2½ miles, and then to the south-west.

There are no permanent inhabitants resident on any of these islands, but they are much frequented by fishermen from Simonor and Borneo, for the beche-de-mer, which are found in great profusion on the reefs to the westward.

The natives report that wild cattle are very numerous in Sibutu, and they often hunt them. Omapui abounds with wild pigs.

Of the numerous islands and shoals between these islands and Darvel bay, there is no information beyond what is given on the charts.

DARVEL BAY lies on the south side of Tanjong Unsang peninsula. The north shore of the bay appears safe, but the west and south sides contain numerous coral reefs, which may generally be seen from a ship's deck with the sun in a favourable position.

Coast.—From Tanjong Labian to Tolibas the land is low and thickly wooded, but to the westward of Tolibas undulating hills commence, and rise to the Bagahak range, the lower hills of which run down to the sea some 7 miles west of Tunku. The line of coast trends uniformly W.S.W. without any great indentation, and the *Egeria* obtained soundings of 13 and 14 fathoms at 1½ to 2 miles from the shore between Tanjong Labian and Sibat river.

Sibat is a small stream the mouth of which is marked by nipa palms; the village is some distance up the river.

Tolibas is a small village on either side of a small stream of the same name, only accessible to boats. The anchorage off it has good holding ground and an even bottom. The *Egeria* anchored here in 8 fathoms at a distance of 1½ miles from the shore, the bottom consisting of mud, and coarse coral sand.

Tunku river is shallow, and discharges itself about 6 miles to the westward of Tolibas. Near its mouth, a shoal bank runs off shore deepening suddenly from 10 fathoms to no bottom at 20 fathoms. The *Egeria* anchored in 10 fathoms about 2 cables distance from the bar. From the point E.S.E. of the river a reef extends half a mile to the southward.

Reef.—A coral reef about 2 cables in extent with 3¾ fathoms over it, was found in lat. 4° 56′ 30″ N., long. 118° 51′ 0″ E., from which the centre of Gaya island bore S. 17° W.

Darvel peninsula is a long low point, covered with trees, about 40 to 50 feet high, their tops being nearly level; at a distance it has the appearance of a long, flat-topped cliff. The chart shows a sounding of 3 fathoms at a distance of 3 miles W. by S. of Shoal point, the south-western extreme of the peninsula.

Sakar island has two islands off the south extremity; it is high, and can be seen over Darvel peninsula.

Lahat Datu.—We have no information about this settlement, the vicinity of which has not been surveyed, but the following directions are given by Captain Gray of the coast-steamer *Paknam*:—

Directions for entering Lahat Datu harbour.—From a position 3 miles south of Shoal point, steer west until the N.E. end of Sakar island bears N.W. by W., then steer for it on that bearing until the easternmost island of a group in the south part of Darvel bay (? Tabuan) is in line with the last gap on the hills on Tanabalu and a peak at the back on the bearing S.S.E. ½ E.; then steer N.N.W. ½ W. which will lead clear of a reef projecting from the N.E. end of Sakar, though close to it. This reef which can always be seen with a good look out, should be rounded at the distance of 50 yards; then, a course W. by N. ¾ W. with the north point of entrance of a river astern, leads clear of reefs to the northward and southward which are easily seen. After passing the northern outer reef, haul up for the houses and anchor in 5 fathoms; the reefs are steep-to, and were marked by beacons (3 stakes), but these often get pulled down.

Bai island shows as a high peaked island, sloping more gradually to the northward than to the southward.

Leila rock, lying S.E. by E. of Bai island, is a coral patch about a quarter of a mile in extent, with 2 feet least water near its southern extremity; its position is indicated by the ripples over it.

Clearing mark.—Mark hill kept open of Bai island clears the Leila rock.

Bati island is a small round island, covered with trees; it is steep-to on its northern side, but a spit projects from its eastern and western ends, and a reef extends from it to Saddle island.

Saddle island is about one mile long N.N.W. and S.S.E., and about 300 feet high.

Silam anchorage, under Mount Silam, is nearly land-locked by six islands, and the anchorage is at the head of the harbour off the settlement between two reefs which partially dry, but have a narrow passage between them. The reefs are marked by beacons of nipa palm: those on the eastern side are painted red, those on the western side white. A gun-boat can anchor between the four beacons in 8 to 10 fathoms; a large ship should anchor further out. The *Egeria* anchored about 1¼ miles off the settlement in 11 fathoms.

Silam.—The North Borneo Company have a small settlemen here; an experimental garden has been planted about half a mile from the beach, in which Liberian coffee seems to grow well; also cardamoms and pepper. Timber is plentiful and good; cattle thrive well.*

Directions.—To enter Silam anchorage, when Pulo Bati is made out, steer for it on a W. ¾ N. bearing; when the houses of the settlement come in sight steer for them on a N.W. by W. ½ W. course, passing between Bati island and Bai island.

Divatu river is only a small stream, and too shallow to allow a ship's gig to enter. The anchorage is about 2½ miles off shore, with the northern of two small islands bearing W. by N. ½ N. in 17 fathoms, mud. Ships should not go in closer as there are many coral patches with deep water between them.

Three reefs were found by H.M.S. *Moorhen* in the western part of Darvel bay, 2 miles E. by S. ½ S. of the mouth of Divatu river. These reefs which break at low water lie in an E.N.E. and W.S.W. direction, and are about a quarter of a mile apart.

Directions.—Vessels visiting Divatu, should bring Saddle island to bear North, and then steer for the northern of the two small islands on a W. by N. ½ N. bearing. Care should be taken to have the sun in the right position for seeing the reefs, which abound in this part of Darvel bay.

Tana Balu or Timbu Mata island in the southern part of Darvel bay, is about 15 miles long, east and west, and 3 miles wide; it is separated from the main land by a sound carrying deep water for about 5 miles up from its southern end, but very shallow water in its western part beyond Pyramid hill. The island is mountainous, rising from a low western point, and having on its eastern extremity a conical hill 1,700 feet high, named Gunong Kuli

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* TIDES.—It is high water, full and change, at Silam anchorage at 6h., springs rise 6¾ feet, neaps 5¾ feet.

Babang.* Tana Balu and Gaya islands form the two most conspicuous objects on the coast. A reef extends about half a mile in a north-westerly direction from Bluff point, the eastern extremity of the island.

Grassy point, forming the south point of Timbu Mata island, is formed by the spur of a hill running down to the water in a north and south direction. Near the water's edge it is fringed with trees, and there are a few on the upper part of the ridge, which otherwise is covered with grass; it is easy to distinguish, being the only comparatively cleared ridge in the neighbourhood. The *Satellite* in 1886 anchored in 10 fathoms, with Grassy point bearing W. ½ W.

The *Egeria* passed the channel between Timbu Mata and Daliang islands on its northern side, and found 4½ fathoms depth in mid-channel at the narrowest part, which is about a quarter of a mile across.

Gaya island, composed of three islands, shows as a long hill, the two outside islands of which have remarkable conical peaks, and the outline of the centre island is also striking. From the north part of Sibuko bay, Gaya island and Timbu Mata island, both of which are thickly wooded, show over the low islands to the southward of them. Gaya island is surrounded by reefs, through which there are many passages. To approach the village on its south side, a passage in will be found round the west point, nothing less than 3 fathoms being found in it by the boat of the *Egeria*.

Reefs.—The reefs west and south-west of Gaya island were seen by H.M.S. *Egeria* when passing, but have not been surveyed. A reef extends for about half a cable west of Low island, which lies about 3 miles S.W. by W. from Gaya, to Sibuan island which lies N. ½ W. about 4 miles from Low island. These two last named islands are both well wooded.

Kuli-Babang island, Bum Bum, and Omadal are low, flat, and wooded islands; there is supposed to be a channel between Kuli-Babang and Bum Bum; but it has not yet been discovered.

Treacher channel, between Kuli-Babang and the main land of Borneo, is said to be the best route for vessels proceeding to Sibuko river. The settlement of Simporna is within the channel on the west side; the tides run strong off the wharf of the settlement.

Directions for Treacher channel.—After passing the island S.E. of Grassy point, the entrance will be easily distinguished by a small hill, the easternmost of all those on the main land, lying right over it: there are no hills on Kuli-Babang. From a position with the eastern extremity of Tana Balu over the centre of S.E. island, and Gaya island and Low island touching, the opening in the reefs which extend off both sides of the entrance will be easily distinguished. Steer a mid-channel course, passing to the westward of Daisy islets which are joined to Kuli-Babang by reefs—the reefs on either side are plainly visible.*

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* This must not be confounded with Kuli Babang island, about 3 miles to the S.E.

Egeria passage.—To the northward of Omadal is an extensive reef, impassable for a large boat; between this reef and the island is a deep channel, continuing between Omadal and Bum Bum islands, and for about 3 miles to the westward, turning to the southward for 3 miles between two reefs, the passage varying in width from 150 to 400 yards. No native name being known for this channel, it was called after H.M.S. *Egeria*.

Anchorage.—The *Satellite* in 1886 anchored in this channel about 1½ cables from the village of Omadal, and found it an excellent anchorage, well protected by sand banks at either end of the channel; and the *Egeria* in 1880 anchored off the village of Kobang in 5 fathoms, with the S.E. point of Bum Bum island bearing N. 58° E. and Si Amil island S. 62° E.

Bum Bum islands are three thickly wooded islands situated on Bum Bum reef, near its western edge; these islands extend 2½ miles in a north-east and south-west direction; Sipangan the south-westernmost, and Timbu-Mata the north-easternmost, have each one summit 340 feet high; Bum Bum, the central and largest has two summits about 358 feet high.

Another small island, thickly wooded, and also named Sipangan, lies 5 miles E.N.E. from Timbu-Mata.

Bum Bum haven, about 5 miles long in a north-east and south-west direction, and one mile broad, with 9 to 12 fathoms, mud bottom, is protected from seaward by Bum Bum islands and reef, which form the south-east side of the haven. The entrance to Bum Bum haven is one mile wide, but the navigable channel is contracted to half a mile by the reefs extending from Hornat point (north-west entrance point), which is thickly wooded and of a dark green colour. About 2 miles within the entrance, the haven is narrowed to 6 cables by a small reef with deep water close around, abreast Timbu-Mata.

Ligitan islands.—Of this group, lying off the north coast of Sibuko bay there is very little information, but they appear to be surrounded by dangers. Si Amil, the north-easternmost, appears by the chart to be wedge-shaped, and 800 feet high; Danawan, to the westward of it, appears to be low.

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* Lieutenant Jones, H.M.S. *Zephyr*, 1886.

A small islet with a few shrubs on it lies in latitude 4° 12½′ N., longitude 118° 54′ E. From it, Si Amil island bears N. 5° W. Reefs extend 4 or 5 miles from this islet in an easterly direction,* and it appears to be connected by a reef to Si Amil; this reef is dangerous, as there are no symptoms except breakers about one mile eastward of the islet.

Sipadan, the southernmost of the group, is 120 feet high. Coming from the eastward Sipadan should be kept to the northward of west, as the extent of the reefs to the eastward of it has not been determined; they do not appear to advance to the southward of the island.

Mabul island, to the northward, is also 120 feet high, and well wooded.

SIBUKO or ST. LUCIA BAY, situated about 70 miles south-west of Tanjong Unsang the north-eastern extreme of Borneo, has on its north side several mountain ranges, the spurs of which extend to the shores of the bay and to the neighbouring coast; the mountains and valleys are covered with extensive forests.

From mount Andrassy, 2,600 feet high, situated about 7 or 8 miles north-westward of Sibuko bay, a ridge extends 11 miles in an easterly direction to mount Wüllerstorf, 1,720 feet high, between which and Pöck range at 7 miles to the eastward flows a little river. From the highest mountain (1,600 feet) of the Pöck range a spur extends 3 miles to the southward, and terminates over point Delconte, in two peaks each 1,000 feet high, and 1½ miles apart east and west.

Erzherzog Friedrich reefs, situated about 4 miles from the shore on the north-east side of Sibuko bay, are steep-to; the westernmost and smallest reef, three-quarters of a mile in extent, dries 7 feet at low water; the middle reef, 1½ miles in extent, dries 8 feet at low water, and is separated from the westernmost by a channel 1¾ miles wide, having near the centre a depth of 12 fathoms; the easternmost and largest reef, portions of which dry at low water, is separated from the middle reef by a narrow impracticable channel.

Caution.—Care is necessary when approaching Erzherzog Friedrich reefs from the eastward, as the extent of the largest reef is not known.

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* In the chart is is shown to extend to the south-east.

Friedrich haven.—The channel between Erzherzog Friedrich reefs and the north-east shore of Sibuko bay forming Friedrich haven, is 18 miles long E.N.E. and W.S.W., and one to 4 miles wide, with depths of 3 to 14 fathoms, mud; in the west entrance of the haven, lie the three Lehnert reefs, which dry 2 feet at low water; the southern reef, 2½ miles from the shore, bears W.N.W., 5 miles from the westernmost Erzherzog Friedrich reef, the northern reefs are 2 miles apart and lie close to the shore.

A shoal,* about 200 yards in extent, having generally about 2¼ fathoms over it, but with two shoal heads of only one fathom at low water, 50 yards apart and near its centre, was found by the *Egeria*. From it the following bearings were taken:—Batu Tinagat point S. 86° W., Saddle hill N. 37° W., and Silungan island N. 62° E.

At the entrance of the little river, which empties itself into the western part of Friedrich haven, lies Kiraz island, 100 feet high; thence to abreast Silungan island (100 feet high and thickly wooded), 6 miles in an easterly direction, a shoal having 12 feet water near its outer edge and 4 to 13 fathoms close to, extends nearly 2½ miles from the shore, narrowing the haven in that part to about one mile.

The east entrance to Friedrich haven, between Erzherzog Friedrich reefs and the Ligitan islands, was not examined by the *Erzherzog Friedrich*. H.M.S *Samarang*, 1845, Captain Sir E. Belcher, however, ran in between these reefs and the islands, anchoring in 10 fathoms within a convenient distance from the shore.

Sandy island, small, and thickly wooded, situated in the east entrance of Friedrich haven, 5 miles east from Silungan island, stands on the north-west part of a shoal about a mile in extent; a portion of this shoal dries at low water in a south-easterly direction from Sandy island.

Anchorage.—The *Erzherzog Friedrich* entered the haven between the two westernmost Erzherzog Friedrich reefs, and anchored in 5 fathoms, mud, 1½ miles north of the western reef.

Tides.—It is high water, full and change, in Friedrich haven at 6h. 30m.; springs rise 12 feet. The streams run one to 2 knots an hour.

Batu Tinagat point is the north entrance point of a channel 20 miles long and 4 to 5 miles wide, formed by the island Sebatik with the main land; at the head it communicates by a narrow channel with Sibuko river.

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* The position of this shoal agrees with that of the southern Lehnert reef found by the *Erzherzog Friedrich*. The chart prior to 1888 showed a patch of one fathom lying 4 miles S. ¾ W. of the above reef, but this patch has now been expunged.

From the point the 5-fathom line extends in a south-easterly direction for about 7 miles, and to the northward of this line the water shoals gradually to the shore.

Batu Tinagat is a small mushroom-shaped rock rising from the sea off the point; it is about 15 feet high, and has a few bushes on it. From this rock the shore trends back a little to the northward of west, and at about 5 miles from the point is the entrance of the little river Tawao, on the left bank of which the Dutch have a small settlement.

Leading mark.—By steering in with a cone-shaped hill named Kukusan, about 630 feet high, bearing N. 42° W., 9 to 12 fathoms of water may be carried up to the anchorage.

Sebatik island.—The only information we have of this locality is from the Dutch chart, on which shoal water and detached patches are shown to extend to 6 miles from the east point of the island. The southern point of the island forms the northern entrance point of Sibuko river.

Sibuko river appears to be large and important; the entrance is divided into arms by the island East Nonokong; on the bar at the mouth of the southern entrance a least depth of 4½ fathoms is shown on the chart. A shoal spit with 3 fathoms at the end is shewn to extend 7 miles to the eastward of Nonokong island.

Detached shoals.—Unarang shoal has a least depth of 7 feet on it, and lies with the following bearings: south point of Sebatik N. 86° W., mount Kukusan N. 40° W.

Padang, a small sand bank covered by 7½ feet water, lies with the south point of Sebatik island N. 89° W., and the east point N. 9° W.

Banda reef is a coral reef with 6 feet of water over it, in lat. 3° 49′ N., long. 118° 0′ E.

Mangkassar is shown as a rock that breaks, lying 6½ miles E. by S. ½ S. of the south point of Sebatik.

The chart shows a patch of 3 fathoms with no soundings round it in lat. 3° 51′ N., long. 118° 11′ E.

SIBUTU PASSAGE, to which allusion has been made (p.183), separates the Borneo islands from the Sulu archipelago. It is a safe and deep channel 18 miles wide between Sibutu and Simonor islands, the shore on either side being steep-to.

In navigating this passage, great attention must be paid to the tides which run with a velocity of 2 to 4 knots. The times of high water at Sibutu island, Dent Haven, Port Bongao, Pearl bank, Dok Kan, and Kagayan Sulu are from 6h. to 6h. 40m., and the stream runs for 3 hours after high and low water; but it must be borne in mind that the times of high water at Tambisan, and on the Borneo coast are from 11h. to 12h., and that the streams are weaker than in the offing.

The officers of the *Nassau* remarked during the survey in 1872 that the tides in the main channel were very steady in direction—flood stream setting to N.W. and ebb to South; but there was uncertainty as to duration, the streams occasionally running as much as 10 hours at a time—probably influenced by the winds and also by changes in the moon's declination, as with the tides on the south coast of Mindanao, *see* Chap. I.

Annex MCM 2

BARON GERICKE TO MARQUESS OF LANSDOWNE, 16 MARCH 1905; MARQUESS OF LANSDOWNE TO BARON GERICKE, 3 OCTOBER 1905

Baron Gericke to the Marquess of Lansdowne.—(Received March 17.)

M. le Marquis,

Londres, le 16 *Mars*, 1906.

M. LE Ministre des Colonies a fait part à son collègue pour les Affaires Étrangères d'une divergence d'opinions survenue entre les autorités Britanniques et certaines autorités Néerlandaises dans le nord de Bornéo au sujet de la délimitation de la ligne-frontière à l'ouest de l'endroit où le parallèle de 4° 10' latitude nord coupe la côte orientale de Bornéo à l'endroit appelé "Broershoek."

Cette controverse a pour cause une interprétation différente de l'Article II du Traité de Frontière conclu le 20 Juin, 1891.

J'ai en conséquence l'honneur de transmettre ci-joint à votre Seigneurie une note développant les vues de mon Gouvernement à cet égard, et je me permets d'en recommander le contenu à sa bienveillante appréciation.

Veuillez, &c.

(Signé) GERICKE.

Memorandum respecting the Anglo-Dutch Frontier in Borneo.

LE Gouverneur-Général des Indes Orientales a porté à la connaissance du Gouvernement de la Reine une divergence d'opinions qui s'est manifestée entre les autorités Britanniques et Néerlandaises dans l'Ile de Bornéo par rapport aux limites exactes des territoires respectifs à l'ouest de l'endroit visé à l'Article I du Traité conclu à Londres le 20 Juin, 1891.

Il parait que l'officier de district à Tawas, ainsi que son chef, le Résident à Lahadatoe, estiment qu'à partir de l'endroit où la côte orientale de l'Ile est traversée par le parallèle de 4° 10′ latitude septentrionale, la ligne de frontière suit d'abord ce parallèle et dévie ensuite dans la direction ouest-nord-ouest entre les Rivières Simengaris et Soedang, pour continuer de cette façon jusqu'à l'endroit où le méridien de 117° longitude orientale de Greenwich traverse le parallèle de 4° 20′ latitude septentrionale.

Le Gouvernement de la Reine ne peut pas partager cette manière de voir, et estime que non seulement d'après le texte, mais aussi d'après la genèse de la Convention, la frontière dans cette partie de l'Ile est formée par une ligne droite entre les Rivières Simengaris et Soedang (abstraction faite des petites déviations, visées à la fin de l'Article I du Traité), joignant l'endroit susénoncé de la côte et l'endroit où le méridien de 117° longitude orientale croise le parallèle de 4° 20′ latitude septentrionale.

Cette interprétation est en harmonie complète avec le texte du Traité, tandis que l'interprétation des autorités Britanniques à Bornéo manque de précision pour autant qu'elle n'indique pas à quel endroit la frontière commencerait à dévier dans une direction ouest-nord-ouest. Le mot "westward" ("westwaarts") au commencement de l'Article II pourrait avoir donné lieu à la manière de voir des autorités Britanniques. Cependant, ce mot ne doit pas être interprété d'une façon littérale, dans le sens de "suivant le parallèle," mais sert-il à indiquer d'une façon générale la direction de la ligne de frontière.

Un simple examen de l'économie du Traité démontre la justesse de cette opinion. Car d'abord les deux hautes parties sont convenues qu'on prendrait comme point de départ pour la délimitation de la frontière l'endroit où la côte de Bornéo est traversée par le parallèle de 4° 10′ latitude septentrionale ("Broershoek"). Comparer—

1. La proposition compromissoire du Gouvernement Britannique, offerte aux Délégués Néerlandais dans la dernière séance, qui a été tenue à Londres au mois de Juillet 1889 par des Représentants des deux pays pour régler la frontière à Bornéo;
2. Le Mémorandum du Ministre Néerlandais près du Cabinet de St. James du 2 Avril, 1890;
3. L'Article I de la Convention. Les Articles II et III règlent la ligne de frontière d'un côté à partir de cet endroit et l'Article IV de l'autre côté, ce qui a été exprimé par les mots "westward" ("westwaarts") dans l'Article II et "eastward" ("oostwaarts") dans l'Article IV.

Par conséquent, le texte même de la Convention ne justifie point l'interprétation d'après laquelle la frontière suivrait d'abord le parallèle de 4° 10′.

En second lieu le Gouvernement Néerlandais appelle l'attention sur la genèse de la Convention. Or, du Mémorandum que le Ministre de la Reine à Londres a transmis le 2 Avril, 1890, au Cabinet de St. James il ressort que le Gouvernement Néerlandais avait d'abord proposé comme frontière à partir de "Broershoek," la ligne de partage des eaux des Rivières de Simengaris et Soedang. Le Gouvernement Britannique ne put pas se rallier à cette proposition et préféra une ligne de frontière qui suivrait à partir de "Broershoek" le parallèle de 4° 10′ latitude septentrionale. (Voir l'office du Marquis de Salisbury au Comte de Bylandt du 13 Août, 1890.)

Le Gouvernement de la Reine craignant que cette frontière ne traversât à plusieurs reprises tout près de la côte le cours de la Rivière Simengaris, ce qui pourrait produire des inconvénients pour le commerce, le Ministre à Londres fut chargé de proposer "une ligne droite partant de 4° 10′ sur la côte et suivant une direction ouest-nord-ouest, entre les Rivières Simengaris et Soedang jusqu'au point où le méridien 117° longitude est de Greenwich traverse le parallèle 4° 20′ latitude nord." Le Comte de Bylandt s'acquitta de cet ordre par son office au Marquis de Salisbury du 2 Février, 1891.

En réponse le Cabinet de St. James se rallia complètement à cette proposition, comme il appert de l'office du Marquis de Salisbury au Ministre Néerlandais du 11 Mars, 1891. Cet office était accompagné du premier projet de Convention, qui n'a pas subi de changements ultérieurs en ce qui concerne la question dont il s'agit.

Il résulte de ce qui précède que non seulement le texte de la Convention, mais aussi sa genèse démontrent comme frontière du territoire Britannique et Néerlandais (abstraction faite de la disposition de la fin de l'Article II) une ligne droite suivant une direction ouest-nord-ouest à partir de l'endroit où le parallèle de 4° 10′ latitude est croise la côte orientale de Bornéo.

Le Gouvernement de la Reine aime à croire que le Cabinet de St. James partage cette manière de voir et voudra bien instruire dans ce sens les autorités Britanniques à Bornéo.

The Marquess of Lansdowne to Baron Gericke.

Sir,

Foreign Office, October 3, 1905.

I HAVE the honour to inform you that, on the receipt of your note of the 16th March last, I called upon the British North Borneo Company for an explanation as to the grounds for the interpretation placed by their local officials upon Article II of the Anglo-Netherland Boundary Convention of the 20th June, 1891.

The Company at once communicated with their principal representative in Borneo, and I have recently been placed in possession of the considerations advanced in support of the view that the boundary between their territory and the possessions of the Queen of the Netherlands should be continued due west for a certain distance from the coast before being drawn in a west-north-westerly direction.

His Majesty's Government have carefully considered the matter, and I have the honour to inform you that it appears to them that the correct interpretation of the disputed Article of the Boundary Convention is that assigned to it by the Netherland Government, that is to say, that the boundary follows a straight line drawn between the point where the parallel 4° 10′ N. cuts the east coast and the spot at which the meridian 117° E. is crossed by the parallel 4° 20′ N., except in places where deviations within certain specified limits are rendered necessary on account of rivers.

The Chartered Company have been informed of this decision, and have been requested to bring it to the knowledge of their officials in Borneo.

I am, &c.

(Signed) LANSDOWNE.

Annex MCM 3

LETTER FROM A. FLINT, BRITISH ADMIRALTY TO UNDER-SECRETARY OF STATE, FOREIGN OFFICE, 23 NOVEMBER 1927

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25 NOV 1927

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L.P.—No. 8.

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Any further communication should be addressed to—
The Secretary of the Admiralty,
London, S.W.1.
quoting M.03034/27.

Admiralty, S.W.1.
23rd November, 1927

Sir,

With reference to Foreign Office letter No. A.5823/586/45 of the 17th October, 1927, on the subject of the administration of certain islands off the East Coast of Borneo, I am commanded by My Lords Commissioners of the Admiralty to transmit herewith for the information of the Secretary of State, chart cutting upon which the definitive boundary now proposed by the United States is marked in red. The temporary boundary which formed the basis of the provisional agreement of 1907 and which is referred to in the American Note as the "Durand Line", is shown in yellow on this chart. This line is practically identical with that shown on chart cutting "A" accompanying Memorandum entitled "Boundary between British North Borneo and the Philippines" which was forwarded under cover of Admiralty letter M.01079/27 of the 4th July, 1927, copy of which was sent to the Colonial Office.

2. A comparison of the proposed definitive boundary

The Under-Secretary of State,
Foreign Office,
S.W.1.

AB.

boundary with tracing "[illegible]" and chart cuttings "C" and "D" accompanying the memorandum referred to above will show that this line is not unduly favourable to United States interests. Even taking that interpretation of the 9 mile limit which is most advantageous to the British North Borneo Company, the balance of gain and loss involved in accepting this line would be as follows:-

The United States would receive Great Bakkungaan Island, which may be claimed as belonging to British North Borneo,

but

British North Borneo would receive Buaning, Lankayan, Mantacuen, Mataking and Ligitan Islands, to none of which she has any valid claim.

3. It appears to Their Lordships, therefore, that there is nothing in the proposed settlement to which objection can reasonably be taken.

4. A copy of this letter has been sent to the Colonial Office.

I am, Sir,

Your obedient Servant,

Alex Flint

Annex MCM 4

LETTER FROM GOVERNOR-GENERAL OF THE NETHERLANDS INDIES TO MINISTER OF COLONIES, 10 DECEMBER 1922

Letter Governor-General of the Netherlands Indies to Minister of Colonies, 10 December 1922

Translation provided by Malaysia. Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2495.

COPY

To: Minister of Colonies
From: Governor-General of
Netherlands East Indies

Batavia, 10 December 1922

No. 1368/18

As Your Excellency will remember from the conclusion of the letter, submitted under No. 403 of the current mail report of the Commander of the Navy dated 4 January 1922, no.106/VIII, uncertainty has arisen with regard to the line to be adopted as the border between the British and Dutch territorial waters near the island of Sibetik[1] in the course of patrols by Her Majesty's destroyer 'Lynx' which monitors the movements of Badjaus in the waters off Borneo. In order to avoid the possibility of any objection, the Vice-Admiral instructed the commander of the 'Lynx' to keep within a line that is an extension of the land border as published in the Law Gazette 1916 no.145, namely the northern parallel of 4 degrees 10'. However, in reference to the well-known Wielingen question, Mr Umbgrove insisted upon a definitive settlement, partly out of consideration of the importance of a firm maintenance of neutrality with an eye to areas which are important for oil supplies.

The Director of Home Affairs when questioned on the matter, agreed in his letter of 17 July 1922 no.7614/Btg. with the advice of the Resident of the region concerned, as indicated in his letter dated 17 May t.v. no. 1475/C 35-2 (c[illegible] current mail report No. 3354) in which Mr Kempen argued that the border line observed by the 'Lynx' is clear and reasonable and that there is as yet no evident Dutch interest requiring a definitive delimitation of the border. The Resident thought that the sea border question could be dropped given, inter alia, the government decision delimiting the land border which was released in the letter of the First

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[1] East coast of Borneo (see map in I.S. 1916 no.145).

Government Secretary dated 22 January 1921 no.267 (cf. mail report no. 228/21).

The Commander of the Navy, who acted as intermediary in submitting the memorandum of Mr Schippers, raised the issue again in considerable detail in his letter of 9 August 1922 no.7234/VIII (included in current mail report no. 3354), arguing that the legal status of the area concerned should be indisputable in view of the possible maintenance of neutrality in the vicinity of Tarakan which is so important for oil fuel supplies. In response to this argument, Mr Schippers refrained from making any further judgements on this issue in his letter of 6 September 1922 no.9412/Btg (in the mail report mentioned above).

The Vice-Admiral indicates, in his latest letter, three possible solutions which Your Excellency can find on the enclosed sketch map:

a. either a line which is an extension of the land border (AB on the map),

b. a perpendicular line from the point where the land border meets the beach (AD),

c. or a line that runs from the same point on the beach to the intersection of the borderlines of the territorial waters of Dutch and British Borneo (AC).

The first mentioned line had to be observed by the 'Lynx' during its patrols. The Admiral now argues that another settlement and solution can be advocated with more success. In my view rightly so. After all, given that the coastal sea is recognised as state territory, not in the last place with a view to defence at sea, it is then illogical to accept the - quite arbitrary - last stretch of the land border as decisive for the water boundary and hence, as demonstrated in the case under discussion, leave open the possibility that foreign sea territory would lie in front of the land territory of another state which, instead of creating order in customs, health and maritime matters (for example in the laying of mines) would cause chaos.

Like the Council of the Dutch East Indies, whose hereby enclosed memorandum dated 10 November 1922 no.VIII I support, of the solutions outlined above under b and c, I regard that under b as the fairest and most defensible. The line AC (solution c) implies the same danger as that of the line which is an extension of the land border while it is based, moreover, on a second arbitrary circumstance, namely the presence on the other side of Cowie Bay of other land territory which is also British.

In agreement with the argument of the Commander of the Navy regarding the necessity of an indisputable legal situation in the territory under discussion, I have the honour to submit to Your Excellency the exchange of ideas on this issue, with the statement that, if the perpendicular line AD does not constitute the evident border line in the coastal sea, a settlement which explicitly lays this down is essential in my opinion.

If consideration of this matter leads to the conclusion that an explicit treaty settlement is necessary for the coastal sea territory, the opportunity could be used, at the same time, to transform into a formal border treaty the agreement made by Dutch and British officials on the land border[1] (referred to in paragraph 2 of the memorandum submitted by the Council of the Dutch East Indies dated 7 January 1921 no.XXIX and included in mail report no.228/21).

I look forward to learning of the result of Your Excellency's deliberations on this matter.

Governor-General of the Dutch East Indies,
by order of:
the First Government Secretary
(signed).

The original of this letter has
been compiled by the Governor-General.

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[1] This refers to the western part of the border, indicated on the map belonging to I.S. 1916 no.145, namely between the Sedalir river and the Padas mountain. See in this regard: letter from the Resident of the Southern and Eastern Department of Borneo dated 13 October 1920 no.10128/2 (instead of this see 1920 no.3291, with reference to DE 1 April 1922 no.85).

Exh. 11. Jan. 1923 No. 24 ×

Gouverneur-Generaal van
Nederlandsch-Indië.

No. 1308/18.-

Batavia, ~~BUITENZORG~~, 10 December 1922.

BIJLAGEN:

ZADER ~~17~~ 18 JANUARI 1923. 4

4

Gelyk Uwe Excellentie zich zal herinneren uit het slot van den onder No. 403 van het loopende mailrapport overgelegden brief van den Commandant der Zeemacht van 4 Januari jl. No. 106/VIII is by de uitoefening door Haar Majesteits torpedojager Lynx van het politietoezicht op naby Borneo rondzwervende Badjau's onzekerheid gerezen nopens de, als grens tusschen het Britsche en Nederlandsche watergebied naby Poeloe Sibetik aan te nemen lyn. Om de kans op tegenspraak te ontgaan heeft toen de Vice Admiraal aan den Commandant van de Lynx voorgeschreven zich te houden aan een lyn, liggende in het verlengde van de by Staatsblad 1916 No. 146 bekend gemaakte grenslyn te land, nl. de noorderbreedte van 4° 10', doch onder verwyzing naar het bekende Wielingen-vraagstuk drong de heer Umbgrove aan op een definitieve regeling, mede met het oog op het belang eener krachtige neutraliteitshandhaving in die met het oog op de olie-voorziening belangryke streken.

De Directeur van Binnenlandsch Bestuur, ter zake gehoord, sloot zich in zyn brief van 17 Juli jl. No. 7614/Btg. aan by den raad van den Resident van het betrokken gewest, vervat in diens aan genoemd departementshoofd gericht schryven van 17 Mei t.v. No. 1475/G35-2 (vgl. loopend mailrapport No. 8834), waarin de heer van Kempen betoogt, dat de door de Lynx geëerbiedigde grenslyn duidelyk en redelyk is, en dat er nog geen evident Nederlandsch belang valt aan te wyzen, dat om grens-

Vaststelling

Aan
Zijne Excellentie
den Minister van Koloniën.

vastlegging vraagt. Mede met het oog op de by brief van den 1sten Gouvernements-Secretaris van 22 Januari 1921 No. 267 (vgl. mailrapport No. 228/21) ten aanzien van vastlegging der landgrens kenbaar gemaakte regeeringsbeslissing meende de Resident, dat ook deze zeegrens-aangelegenheid zou kunnen blyven rusten.

De Commandant der Zeemacht, door wiens tusschenkomst de heer Schippers zyn advies inzond, kwam in zyn onder genoemd No. 3354 van het loopende mailrapport overgelegden brief van 9 Augustus jl. No. 7234/VIII uitvoerig op de zaak terug, o.m. betoogende dat met het oog op mogelyke neutraliteitshandhaving naby het uit een oogpunt van oliebrandstofvoorziening zoo belangryke Tarakan de rechtstoestand van het betroffen gebied van te voren onbetwistbaar moet vaststaan. Na deze motiveering heeft de heer Schippers blykens zyn by meergenoemd mailrapport overgelegd schryven van 6 September jl. No. 9412/Btg. zich van een verdere beoordeeling dezer aangelegenheid onthouden.

De Vice-Admiraal geeft in zyn jongsten brief drie mogelyke oplossingen aan, welke Uwe Excellentie zal terugvinden op de bygevoegde schetskaart te weten:

a. óf een lyn in het verlengde der landgrens (op de kaart AB),
b. óf een loodlyn op het strandpunt der landgrens (AD),
c. óf een lyn van dat strandpunt naar het snypunt van de grenslynen van de territoriale wateren van Nederlandsch- en Britsch Borneo (AC).

De eerstgenoemde lyn heeft de "Lynx" by zyn toezicht moeten in acht nemen. Thans betoogt de Vlootvoogd, dat eene andere regeling en oplossing met meer succes bepleit kunnen worden. Naar myne meening terecht. Immers, houdt men in het oog, dat de kustzee als staatsgebied erkend wordt niet het

minst

minst met het oog op de defensie ter zee, dan is het ongerymd de -bloot toevallige- laatste richting der landgrens als beslissend voor de watergrens te aanvaarden, en daarmede, gelyk het onderhavige geval demonstreert, de mogelykheid open te laten, dat vreemd watergebied zich uitstrekt vóór het landgebied van een anderen staat; hetgeen in plaats van orde, in douanier sanitair en maritiem opzicht (men denke aan het leggen van mynen) chaos ter zee tot gevolg zou moeten hebben.

Evenals de Raad van Nederlandsch-Indië, met wiens in afschrift hierby gevoegd advies van 10 November jl. No.VIII ik my vereenig, acht ik van de onder b en c hierboven vermelde oplossingen die onder b de billykste en best verdedigbare. De lyn AC toch (oplossing c) brengt hetzelfde gevaar mede als de lyn in het verlengde der landgrens, terwyl zy bovendien gebaseerd is op een tweede toevallige omstandigheid nl. de ligging aan de overzyde der Cowiebaai van ander en wel eveneens Engelsch gebied.

My in zake de noodzakelykheid van een onbetwistbaren rechtstoestand in het onderhavige gebied aansluitende aan het betoog van den Commandant der Zeemacht heb ik de eer Uwer Excellentie de gevoerde gedachtenwisseling voor te leggen, onder mededeeling dat, mocht de loodlyn AD niet de vanzelf sprekende grenslyn in de kustzee vormen, een regeling, die zulks uitdrukkelyk vastlegt, my noodzakelyk voorkomt.

Zoo de overweging van deze aangelegenheid leidt tot de erkenning, dat uitdrukkelyke tractaatsregeling voor het zeegebied noodig is, ware van de gelegenheid gebruik te maken om tevens het ten aanzien der landgrens onderhands tusschen Nederlandsche en Britsche bestuursambtenaren getroffen vergelyk (bedoeld in lid 2 van het onder mailrapportnummer 228/21 overgelegde advies van den Raad van Nederlandsch-Indië van 7 Januari

[illegible]
[illegible]
[illegible] 145 [illegible]
[illegible]
[illegible] 13 Oct '20 [illegible] 10128 [illegible] / [illegible] '20 [illegible] 232 [illegible] April '22 [illegible] 1251.

art 1921 No. XXIX) om te zetten in een formeele grensbepaling.

Gaarne zal ik nopens een en ander te zyner tyd vernemen, tot welk gevolg Uwer Excellentie's overwegingen geleid hebben.-

De Gouverneur-Generaal
van Nederlandsch-Indië,
Op last:
De 1ste Gouvernements Secretaris,

De minuut van dezen brief
is door den Gouverneur-
Generaal vastgesteld.-

Annex MCM 5

MEMORANDUM WITH ATTACHMENTS, LEGAL DEPARTMENT, MINISTRY OF FOREIGN AFFAIRS, 8 AUGUST 1923

Memorandum with attachments, Legal Department, Ministry of Foreign Affairs to Ministry Colonies, 8 August 1923.

Translation provided by Malaysia. Text in ARA, *Min. of For. Affairs*, 2.05.21, inv. No. 1013.

Department of Legal Affairs
Number 1252/7634

The Hague, 8 August 1923

To Ministry of Colonies.

Enclosed with the appendices of your letter dated 18 January 1923 Dept. IV No. 4, I have the honour to inform you of the following. Although, in general, a lot can be said in favour of determining the boundary of territorial waters of two bordering countries by drawing a perpendicular line from the point where the land border meets the coast, I take the view that, in the case under discussion, several circumstances are in favour of adopting an extension of the land boundary of the island of Sebetik as the boundary between the Dutch and British territorial waters on the east coast of the island. One of the circumstances which favours this option is the passage in the Explanatory Memorandum submitted to the Dutch Parliament with the bill to approve the 1891 Convention relating to the division of Sebatik along the parallel of 4° 10' N.: "By this division of the island both the Netherlands and British North Borneo will have that area of the island in possession which forms the shore of the waterway along which each has to reach the coastal area allocated to them; this is fair and rational." I was not able to ascertain if the formulation of this passage had been based on an exchange of opinion between Dutch and British authorities. In any case, it seems to me that in the formulation of this passage there was no intention to restrict access to the British area of North Borneo through the river mouth that lies north of Sebetik by delimiting Dutch territorial waters along a perpendicular line drawn from the coastal boundary point in this river mouth.

Another circumstance in favour of extending the land border of Sebetik into the sea is a map, submitted with the bill mentioned above, on which the border between the areas under Dutch and British jurisdiction on land and sea is extended along the parallel 4° 10' N. As far as I

could ascertain, this map does not result from actual consultation between the Netherlands and Great Britain; however, I regard it as not impossible that this map is known to the British Government.

These two circumstances, however, are not of such a nature that, should very significant Dutch interests be damaged by a delimitation of Dutch territorial waters east of Sebatik along the parallel of 4° 10' N., an attempt should not be ventured to seek recognition from the British Government for a delimitation of the territorial waters along the perpendicular line from the eastern coastal border point into the sea. However, it does not appear to me that such great Dutch interests are at stake as to risk a possible rebuff from the British Government. I would hence like to be further informed by Your Excellency with respect to the Dutch interests which are at risk here, after which I could reconsider the case.

The Minister of Foreign Affairs.

Note ad 7652/1252-'23
7636

It is significant that of the reference works of international law[*] and international law of the sea[**] that I have consulted which, without exception, address the question of how to delimit territorial waters - in other words, if this area is three or more nautical miles wide and if this width begins at the high or low tide mark -, not one explicitly establishes if the territorial waters of two bordering countries are separated by an abstract perpendicular line from a coastal border point into the sea or by an abstract extension of the last sector of the land border. Even the authors, who specialise in this particular subject of the territorial sea[***], do not concern themselves with this question. In my opinion, it can only be concluded that the question is NOT a question in international law and that either solution is recognised as definitive. If that is the case, the choice in favour of the perpendicular line from the coast (over that of extension of the last section of the land border) does not appear dubious, firstly, because assigning territoriality of coastal waters can be explained historically given the necessity of coastal defence considerations (the width of territorial waters was long related to cannon range) and the fact that the coast at a border point has more rather than less need of security (by extending a land border that obliquely meets the coast, one of both countries would always be disadvantaged), and further, because the control of a FULL strip of a certain width of the coastal waters is specifically related to the possession of the coast, without any exception being made for the part of the coast where the land border meets the coast in the first proposed definition of territorial waters of the Institut de Droit International in the session in Paris on 31 March 1894 which states: "La mer territoriale s'étend à six milles marins de la laisse de basse marée sur toute l'etendue des côtes."

Let it be noted in passing that in the Wielingen question there has been discussion of "une ligne courant du point de rencontre de la laisse des basses eaux et de la ligne frontière Hollande-Belge dans une direction perpendiculaire à la ligne de la côté", and then again only

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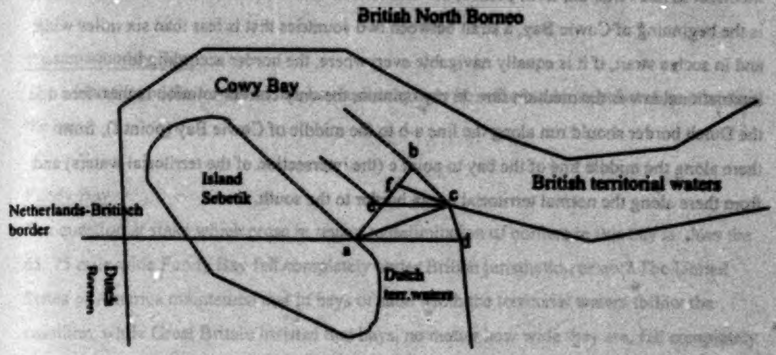
[*] The works I consulted include: de Martens, *Précis du Droit des gens* (1864); Pradier Fodéré, *Traité de Droit international public* (1885); P. Fiore, *Le Droit international codifié* (1890); Calvo, *Le Droit international théorique et pratique* (1896); Lawrence, *The Principles of International Law* (1915); Bonfils, *Manuel de Droit international public* (1914); *Wheaton's elements of international law* (1916); von Liszt, *Das Völkerrecht* (1918); Oppenheim, *International Law* (1920).

[**] Den Beer Poortugael, *Het internationaal maritiem recht* (1888) and Nijland, *Handleiding bij de beoefening van het internationaal zeerecht* (1905).

[***] Louton, *La mer territoriale* (1899); L.E. Visser, *De territoriale zee* (1894); P. Gody, *La mer côtière*; de

of "le prolongement de la frontière terrestre entre la Hollande et la Belgique". But the last section of the Dutch-Belgian land border is perpendicular to the coast and hence the extension of the land border coincides with the perpendicular line from the coast.
This is NOT the case for the eastern end of the Dutch-British land border in Borneo where, moreover, other complications are involved. The situation is shown in the following sketch:



The border of Dutch territorial waters could be either the line a-d (extension of the last section of the land border into the sea) or the line a-c (the line which joins the border point on the coast with the intersection of Dutch and British territorial waters. On the basis of the above argument it appears to me that extension of the land border into the sea (a-d), the solution which the Resident of South and East Borneo regards as the only correct one, is not acceptable as the correct solution. Neither is the line a-c, a solution which has no support and which could be disputed on the same grounds as solution a-d. I am in agreement with the Chief-of-Staff of the navy in the Dutch East Indies and the Governor-General that the border of Dutch territorial waters should run along the line a-b (the line perpendicular from the coast). In the meantime, there has apparently been no consideration in the Indies of how far

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Villeneuve, *La ligne séparative des eaux nationales et de la mer territoriale* (1914).

the border should run along the line a-b. NOT to point b, as that lies in the middle of British territorial waters. There has apparently been some sensitivity to this point in the Indies as the map sketched there shows point d on the borderline of British territorial waters. Consequently, it appears that the intention is to let the Dutch border run along the perpendicular line to the point that is three miles from the British coast i.e. a-f. This seems incorrect to me. After all, from point c, the intersection of Dutch and British territorial waters, is the beginning of Cowie Bay, a strait between two countries that is less than six miles wide; and in such a strait, if it is equally navigable everywhere, the border according to international law is the medium line. In my opinion, the only correct solution is therefore that the Dutch border should run along the line a-b to the middle of Cowie Bay (point f), from there along the middle line of the bay to point c (the intersection of the territorial waters) and from there along the normal territorial ocean border to the south.

30 March 1923

The central question is if the territorial waters of two bordering countries are separated by the perpendicular line from the coast or by the extension of the last section of the land border. In none of the cases below I could find anything which could contribute to answering this question.

Passamaquoddy Bay:

The arbitration of the border in this bay indicates only how the border runs between islands in the bay.

Fundy Bay:

The question at stake which arose in regard to delimitation of borders in this bay is: does the 65, 75 mile wide Fundy Bay fall completely under British jurisdiction or not? The United States of America maintained that in bays of such width the territorial waters follow the coastline, while Great Britain insisted that bays, no matter how wide they are, fall completely inside the territorial waters. The arbitration of this dispute is hence not of interest in answering the above question.

Gulf of Georgia:

Here the border is delimited by the 49° meridian of longitude until the middle of the bay from where the border runs further through the middle of the bay. Where the 49° meridian of longitude is not perpendicular to the coast, the continuation of the land border is not perpendicular to the coast. In my opinion, this cannot be seen as the application of a fixed rule. The continuation along the meridian lies in the fact that the border is further delimited by treaty (through the middle of the bay).

The Alaska Boundary arbitration of 1909. Has also no relevance for the above question.

British Honduras

Both the northern border and the southern border gave rise to this arrangement in both 1893 and 1859 which is however of little interest for the above question.

For the continuation of the eastern border of Nigeria and Sierra Leone I could not find anything.

Afd. IV

No. ~~Geheim~~ 7634

1282

Mede-afdeeling van

Ingeschreven

Datum [illegible] Aug 1903.

Ⓓ

VERZONDEN

Aan [illegible] Koloniën.

over [illegible] Borneo.

Bij de Zamenstelling der bijlage der Min.s missive dd. 10 Juni jl. Afd. IV No 4 heb ik de eer [illegible] [illegible] [illegible] [illegible] [illegible] door eene bepaling der territoriale wateren ~~[illegible]~~ der twee aangrenzende landen [illegible] [illegible] [illegible] [illegible] het [illegible] [illegible] de [illegible] in het [illegible] [illegible] [illegible], [illegible] het [illegible], dat in het [illegible] [illegible] [illegible] [illegible] te [illegible], [illegible] de [illegible] tusschen de Nederlandsche en Britsche territoriale wateren [illegible] de [illegible] van het eiland Sebatik [illegible] te [illegible] de [illegible] [illegible] ~~[illegible]~~ [illegible] de landgrens op het eiland. [illegible] [illegible] [illegible], [illegible] het [illegible] [illegible], [illegible] [illegible], [illegible] de [illegible] [illegible] de [illegible] [illegible] [illegible] het [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] de [illegible] [illegible] het eiland Sebatik [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] de parallel van 4° 10'. Door deze [illegible]

Bijlagen te weten: bijl. d. [illegible] 1 afschrift [illegible] [illegible] het X [illegible] bijl. 2

Retroacta Afd. [illegible]

Index Folio.

deeling van het eiland," zoo ver
de autoriteit der toekenning, "dat
is Nederland en de Britsche Noord
Borneo maatschappij dus ge-
deelte van het eiland in bezit
hebben, dat de een interesse
van het [illegible] [illegible]
elk kunnen het hun toegekend
grondgebied naar verkiezen.
dit is billijk en rationeel". Hier
is mij niet zoozeer gelukt
uit te vinden, of dat de opstel-
ling van die grens die Commis-
[illegible] tusschen Nederland-
sche en Britsche autoriteiten te
'sGravenhage heeft plaats. Voor
het komt mij voor, dat bij de
opstelling dier grens ter zee niet
~~[illegible]~~, de teekening voor
het Britsche gebied der Noord-
Borneo langs het te Noord
van Sebatik gelegen zoo[illegible]
bij te beperken voor die be-
lijning de Nederlandsche terri-
toriaal water langs die kust
ligt, of het landgrenspunt in de
riviermonding opplaatsen.
Een ander twistdispuut, die
plaats voor die aanteekening in
zee van de [illegible] landgrens van het
eiland Sebatik is, dat bij de
Nederlandsche toekenning der
de Staten-Generaal is vermeld
die [illegible], waarop de grens lin-
[illegible] het de Nederlanders [illegible] [illegible]

Opplaatsen [illegible]

in de behandeling heeft plaats

Afd. Jz.

No.

Dossier Lᴬ No.

's Gravenhage, den 18

Mede-afdeeling van

Aan

over

Nederlandsche gebied te [illegible] te doorsnijden langs den parallel 4° 10'. Hoe men ook het [illegible] [illegible], hetzij door haar niet op Sebatik te deelen, [illegible] Engelsche plaats gehad hebbende, [illegible]; door ik kan het gevoelen niet onderdrukken, dat die daad die der Britsche Regeering geweest is.

[illegible] [illegible] Zij [illegible] niet [illegible] dit land, dat, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] de wordt [illegible] door de [illegible] der [illegible] [illegible] wateren langs den parallel 4° 10', niet [illegible] [illegible] [illegible] en dat de Britsche Regeering [illegible] te [illegible] dat de [illegible] dien territoriaal wateren langs de [illegible], of het oostelijk eindgrenspunt op Sebatik te [illegible]. Dat [illegible] [illegible] groot [illegible] belang betrokken zijn, dat [illegible] door de [illegible] bij de [illegible] Regeering [illegible] [illegible], [illegible]

[illegible] Foster ad Sebatik

Bijlagen te weten:

Retroacta

Index Folio.

mij niet gebleken. Ik [illegible] [illegible] [illegible] in [illegible] [illegible] [illegible] ~~[illegible]~~, [illegible] [illegible] [illegible] [illegible] te [illegible]: de belangen, die hier op [illegible] [illegible], [illegible] in het [illegible] [illegible] [illegible] [illegible] te [illegible].

[illegible]
Resid
Ag.

[illegible]

Aanteekening ad {1252 - 28.
{7634

Opmerkelijk is, dat de handboeken van Volkenrecht*) en de enkele door mij geraadpleegde werken over internationaal Zeerecht**), die ten deele uitvoerig zich bezig houden met de vraag, hoe de territoriale zee in hare breedte begrensd wordt — m.a.w. of zij 3 of meer mijl breed is en of die breedte aanvangt bij de laagwaterlijn of bij de hoogwaterlijn —, geen van allen uitdrukkelijk uitmaken, of de territoriale zeegebieden van twee aangrenzende landen gescheiden worden door de denkbeeldige loodlijn, opgericht op het aan de kust gelegen grenspunt, dan wel door de rechtlijnige verlenging van de laatste sector van de landgrens. Zelfs de schrijvers, die de territoriale zee tot het bijzondere onderwerp van hunne studiën hebben gemaakt***) houden zich met die vraag niet bezig.

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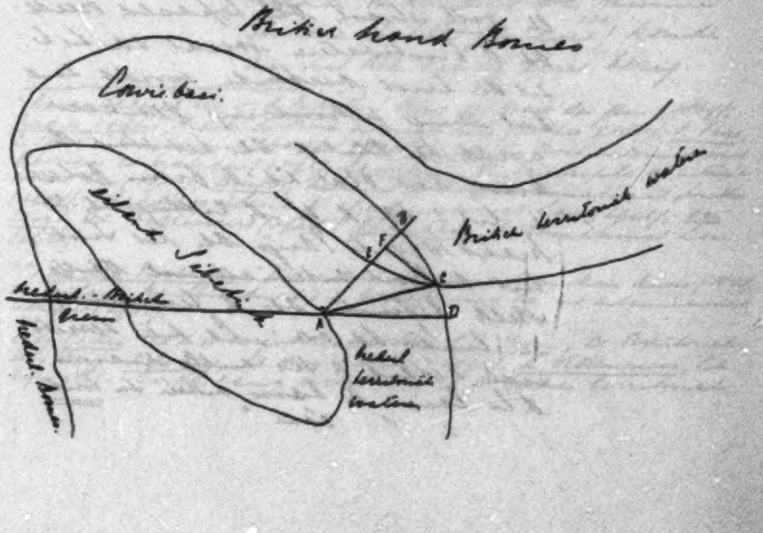
*) Geraadpleegd heb ik: de Martens, Précis du droit des gens (1864); Pradier Fodéré, Traité de droit international public (1885); P. Fiore, Le droit international codifié (1890); Calvo, Le droit international théorique et pratique (1896); Lawrence, The Principles of international law (1905); Bonfils, Manuel de droit international public (1901); Wheaton's Elements of international law (1904); v. Liszt, Das Völkerrecht (1906); Oppenheim, International Law (1905).

**) den Beer Poortugael, Het internationaal maritiem recht (1888) en Vrijland, Handleiding bij de beoefening van het internationaal zeerecht (1915).

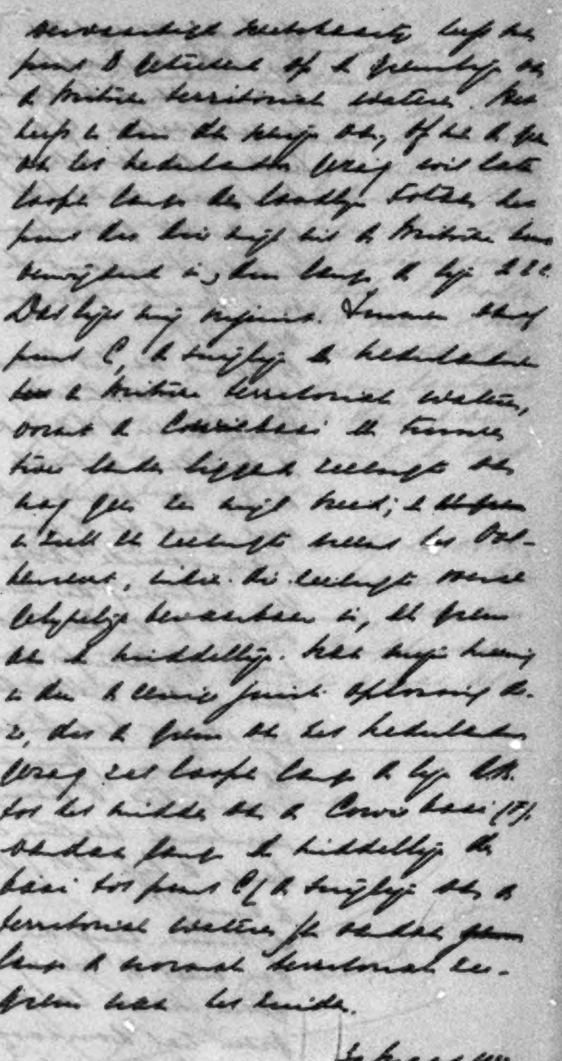
***) Latour, La mer territoriale (1889); C. S. [illegible], The Territorial sea (1889); P. Godey, La mer côtière (1896); Ch. Villeneuve, [illegible] des eaux nationales et de la mer territoriale [illegible] territoriale zee [illegible] Institut de Droit international [illegible] definitie [illegible] territoriale zee [illegible] territoriale [illegible] côte.

Terloops zij nog opgemerkt, dat bij de [illegible] [illegible] [illegible] [illegible] [illegible]: une ligne courant du point de rencontre de la limite des deux pays et de la ligne frontière hollando-belge dans une direction perpendiculaire à la ligne de la côte; dus niet alleen de „le prolongement de la frontière terrestre entre la Hollande et la Belgique"! Ook, waar ik [illegible] [illegible], de laatste sector van de Nederlandsch-Belgische grens loodrecht op de kust staat, valt dus de verlenging van de landgrens [illegible] de loodlijn op de kust samen.

Dit is niet het geval bij het oostelijk eindpunt der Nederlandsch-Britsche grens op Borneo, waar [illegible] bovendien nog andere complicaties voordoen. De situatie is daar aldus:


British Noord Borneo
Cowie-baai
eiland Sebatik
Nederl.-Britsche grens
Nederl. Borneo
Nederl. territoriale wateren
Britsche territoriale wateren
A
B
C
D
E

[illegible] Indië [illegible] [illegible]. is de
lijn AB (de landlijn op de kaart)
de grens van de Nederlandsche terri-
toriale wateren, of de lijn AD. (ver-
binding der uiterste [illegible] van de
landgrens in zee) of de lijn AC (de
lijn, die het [illegible] op het [illegible]
[illegible] [illegible] de Nederland-
sche en Britsche territoriale wateren
verdeelt).
Op grond van het [illegible], behoorde
[illegible] mij [illegible] van de land-
grens in zee (AD), de oplossing,
de [illegible] van [illegible] - [illegible] [illegible]-
[illegible] van Borneo [illegible] [illegible]
[illegible], [illegible] [illegible] de [illegible] oplossing
[illegible] [illegible]. de lijn AC,
[illegible] oplossing die [illegible] [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] [illegible]
[illegible] op [illegible] [illegible] [illegible] de [illegible]
[illegible] AD. [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] Indië [illegible] [illegible] [illegible]
Gouvernement. [illegible] [illegible] [illegible]
[illegible] [illegible] de grens der Nederl.
territoriale wateren [illegible] [illegible]
[illegible] de lijn AB. (de landlijn op
de kaart).
[illegible] [illegible] [illegible] de Indië [illegible]-
[illegible] [illegible] de [illegible] [illegible] de [illegible]
[illegible], [illegible] [illegible] de lijn AB. de
grens [illegible] [illegible]. [illegible] [illegible]
[illegible] B., [illegible] [illegible] [illegible] [illegible]
in de Britsche territoriale wateren.
[illegible] [illegible] [illegible] [illegible] in Indië [illegible]
[illegible] [illegible], [illegible] op het [illegible]



[illegible] [illegible] loopt de
punt B [illegible] op de grenslijn der
de British territorial waters. [illegible]
[illegible] [illegible] [illegible] [illegible], op het [illegible]
[illegible] het Nederlandsche Vlag [illegible] [illegible]
loopen langs [illegible] [illegible] [illegible] [illegible]
punt [illegible] [illegible] [illegible] [illegible] de British [illegible]
[illegible] [illegible], [illegible] [illegible] de lijn A.B.C.
Dit lijkt mij [illegible]. [illegible] [illegible]
punt C, de grenslijn der Nederlandsche
en de British territorial waters,
omdat de [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]; de [illegible]
de [illegible] [illegible] [illegible] [illegible] [illegible] Oost-
[illegible], [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible], [illegible] [illegible]
[illegible] de middellijn. [illegible] [illegible] [illegible]
[illegible] [illegible] de [illegible] [illegible] [illegible] [illegible]
2, dat de [illegible] [illegible] het Nederlandsche
Vlag zal loopen langs de lijn A.B.
tot het midden [illegible] de [illegible] baai (?),
[illegible] [illegible] de middellijn der
baai tot punt C, de grenslijn der
territorial waters [illegible] [illegible] [illegible]
langs de normal territorial [illegible]
[illegible] [illegible] [illegible] [illegible].

[illegible] [illegible] [illegible]

De vraag [illegible] de baai, i.e. of de territoriale wateren der twee aangrenzende landen worden [illegible] door de [illegible] of de lijn [illegible] door het [illegible] der [illegible] [illegible]. Bij [illegible] de [illegible] [illegible] het is [illegible] [illegible] [illegible], was tot de beantwoording dezer vraag [illegible] [illegible].

Passamaquoddy Bay.
De [illegible] de [illegible] te deze baai plaats gehad hebbende arbitrage [illegible] alleen uit, hoe de [illegible] tusschen de in die baai gelegen eilanden [illegible] [illegible].

Fundy Bay.
De beantwoording [illegible] [illegible] [illegible] [illegible] zaak [illegible] de [illegible] [illegible] [illegible] [illegible] [illegible], i.e. [illegible] de [illegible] [illegible] Fundy Bay als of niet [illegible] [illegible] [illegible]? De Ver. Staten v. Am. hielden vol, dat de baai als een [illegible] [illegible] de territoriale wateren de kustlijn volgen, Engeland hield vol, dat de baai, [illegible] [illegible] [illegible] [illegible], geheel binnen de territoriale wateren vallen. De [illegible] [illegible] plaats gehad hebbende arbitrage is [illegible] [illegible] tot de beantwoording der voornaamste vraag [illegible] [illegible] [illegible].

Gulf of Georgia
Hier wordt de grens bepaald door de [illegible] [illegible] [illegible], [illegible] de [illegible].

[illegible]

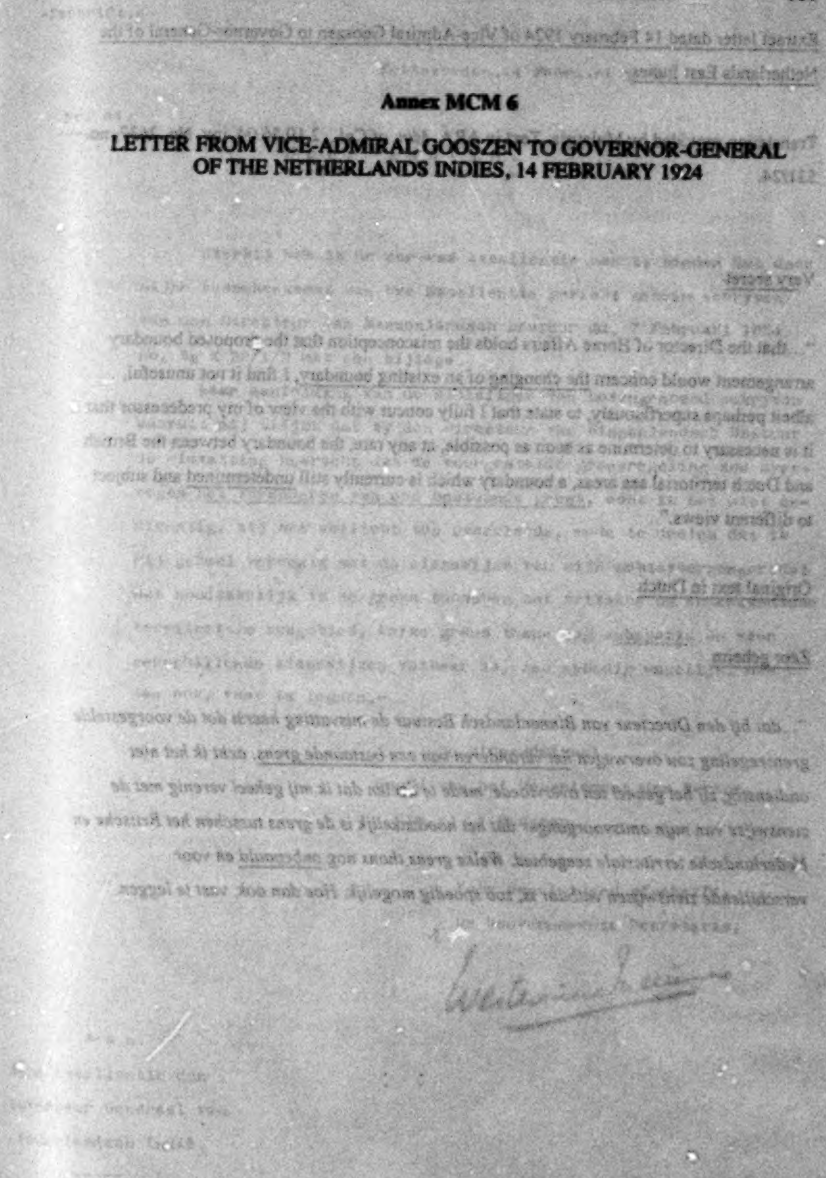
[illegible]

[illegible]

[illegible]

Annex MCM 6

LETTER FROM VICE-ADMIRAL GOOSZEN TO GOVERNOR-GENERAL OF THE NETHERLANDS INDIES, 14 FEBRUARY 1924



Extract letter dated 14 February 1924 of Vice-Admiral Gooszen to Governor-General of the Netherlands East Indies

Translation provided by Malaysia. Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2637, no. 531/24.

Very secret

"...that the Director of Home Affairs holds the misconception that the proposed boundary arrangement would concern the changing of an existing boundary, I find it not unuseful, albeit perhaps superfluously, to state that I fully concur with the view of my predecessor that it is necessary to determine as soon as possible, at any rate, the boundary between the British and Dutch territorial sea areas, a boundary which is currently still undetermined and subject to different views."

Original text in Dutch

Zeer geheim

"...dat bij den Directeur van Binnenlandsch Bestuur de misvatting heerst dat de voorgestelde grensregeling zou overwegen het veranderen van een bestaande grens, acht ik het niet ondienstig, zij het geheel ten overvloede, mede te deelen dat ik mij geheel verenig met de zienswijze van mijn amtsvoorganger dat het noodzakelijk is de grens tusschen het Britsche en Nederlandsche territoriale zeegebied. Welke grens thans nog onbepaald en voor verschillende zienswijzen vatbaar is, zoo spoedig mogelijk. Hoe dan ook, vast te leggen."

Afschrift.-

Weltevreden, 14 Februari 1934.

No. 64.

Zeer geheim.

Hierbij heb ik de eer Uwe Excellentie aan te bieden het door mijne tusschenkomst aan Uwe Excellentie gericht geheim schryven van den Directeur van Binnenlandsch Bestuur dd. 7 Februari 1934 no. Bg X 22/1/2 met een bijlage.

Naar aanleiding van de slotalinea van bovengenoemd schryven waaruit mij blijkt dat by den Directeur van Binnenlandsch Bestuur de misvatting heerscht dat de voorgestelde grensregeling zou overwegen het veranderen van een bestaande grens, acht ik het niet ondienstig, zij het wellicht ten overvloede, mede te deelen dat ik mij geheel vereenig met de zienswijze van mijn ambtsvoorganger dat het noodzakelijk is de grens tusschen het Britsche en Nederlandsche territoriale zeegebied, welke grens thans nog onbepaald en voor verschillende zienswijzen vatbaar is, zoo spoedig mogelijk, hoe dan ook, vast te leggen.-

De Vice-admiraal,
Hoofd van het Departement der Marine,
(w.g.) Goossen.

Voor eensluidend afschrift;
De Gouvernements Secretaris,

Aan
Zijne Excellentie den
Gouverneur Generaal van
Nederlandsch Indië.

Annex MCM 7

LETTER FROM MINISTER OF FOREIGN AFFAIRS TO MINISTER OF COLONIES, 27 SEPTEMBER 1926

Extract Letter Minister of Foreign Affairs to Minister of Colonies, dated 27 September 1926.

Translation provided by Malaysia. Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2877.

"In response to the conclusion of your Excellency's letter [dated 7 September 1926] as cited above, I hereby inform you that I cannot recommend raising with the British Government the matter of the boundary between the Dutch and British territorial waters on the Eastern coast of the island of SIBETIK, because I do not consider it desirable to raise a question without reason and it does not appear that the British Government would object to the perpendicular line on the coast as the boundary line in this area. As this is the most evident solution, it seems not unlikely to me that the British Government itself will subscribe to it. The fact that this solution is in accordance with the principles of international law most adhered to, derives in my view from the recognition of the right to territorial waters in general, namely the desirability that the water in FRONT of the coast falls under the same agreement as the coast. In the case of deviation from the perpendicular line, no justice is given to this principle. However, a fully definitive rule in international law cannot be given."

Original text in Dutch

"Naar aanleiding van het slot Uwer Excellentie's hierboven aangehaald schrijven deel ik Haar mede, dat het m.i. geene aanbeveling verdient de aangelegenheid van de grens tusschen de Nederlandsche en Britsche territoriale wateren aan de Oostkust van het Eiland SIBETIK bij de Britsche Regeering ter sprake te brengen, omdat ik het niet wenselijk acht onnooodig eene quaestie op te werpen en niet is gebleken, dat de Britsche Regeering bezwaren heeft te dier plaatse als grenslijn aan te nemen de llodlijn op de kust. Waar dit de meest normale oplossing is, komt het mij niet onwaarschijnlijk voor, dat de Britsche Regeering zelve daaraan vasthoudt. Dat deze oplossing in overeenstemming is met de meestentijds in het Volkenrecht aangenomen beginselen, vindt m.i. een voorname reden in den grond van de erkenning van het recht op territoriale wateren in het algemeen, n.l. de wenschelijkheid, dat het VOOR de kust gelegen water tot dezelde overeenkomst als dekust zelve behoort. Een volkomen vaste regel is echter in het Volkenrecht niet gegeven."

MINISTERIE VAN
BUITENLANDSCHE ZAKEN.

Exh. 28. Sep. 1926 No 1

Afdeeling Juridische Zaken.
N°. 27516.
Bijlagen:

's-GRAVENHAGE, den 27sten September 192

Men wordt verzocht, bij de aanhaling van dezen brief dagteekening, nummer en afdeeling nauwkeurig te vermelden.

NADER 2. OCT. 1926 41

4

In antwoord op Uwer Excellentie's missive dd. 7 dezer, 4de Afdeeling, nr. 6, waarvan de bijlagen hiernevens weder teruggaan, heb ik de eer Haar mede te deelen, dat er bij mij geen bezwaar tegen bestaat in den aanhef van het ontwerp-verdrag, alsmede in artikel 1 daarvan te spreken van NADER vast te stellen in stede van VERBETERD vast te stellen; de Engelsche tekst is dienovereenkomstig gewijzigd. Voorts kan ik mij er mede vereenigen, dat, waar Uwe Excellentie van oordeel is, dat eene astronomische vastlegging van de toppen van den GOENOENG API en den GOENOENG RAJA in het verdrag overbodig is en bovendien eene speciale opneming ter plaatse daarvoor nog noodig zou zijn, de astronomische aanduiding dier punten achterwege blijft. Voorts is artikel 2 (aan het einde) aangevuld als door Uwe Excellentie in § 4 van Hare missive in overweging is gegeven. De term "triangulatie-station" zou naar mijne meening, met het oog op den Engelschen tekst, gehandhaafd kunnen worden.

Ik nam nota van Uwer Excellentie's mededeeling, dat Zij de bij het sluiten van het verdrag te bezigen kaart door tusschenkomst van de Nederlandsch-Indische Regeering heeft besteld. Zooals een der ambtenaren van mijn Departement reeds telephonisch heeft doen opmerken, is ééne kaart niet voldoende, vermits het verdrag in duplo gesloten wordt en dus minstens twee kaarten noodig zijn. Waar het bovendien wenschelijk kan blijken, dat ieder der Partijen reeds aanstonds over een extra exemplaar dier kaart beschikt, zou het aanbeveling verdienen, dat reeds thans vier exemplaren dier kaart besteld worden.

KOL. D.
No. 463
4e AFDEELING

Naar aanleiding van het slot van Uwer Excellentie's hierboven aangehaald

Zijner Excellentie
Heere Minister van KOLONIËN.

aangehaald schrijven deel ik Haar mede, dat het m.i. geene aanbeveling verdient de aangelegenheid van de grens tusschen de Nederlandsche en de Britsche territoriale wateren aan de Oostkust van het Eiland SIBETIK bij de Britsche Regeering ter sprake te brengen, zoodat ik het niet wenschelijk acht onnoodig eene quaestie op te werpen en niet is gebleken, dat de Britsche Regeering bezwaren heeft te dier plaatse als grenslijn aan te nemen de loodlijn op de kust. Waar dit de meest normale oplossing is, komt het mij niet onwaarschijnlijk voor, dat de Britsche Regeering zelve daaraan vasthoudt. Dat deze oplossing in overeenstemming is met de meestentijds in het Volkenrecht aangenomen beginselen, vindt m.i. een voorname reden in den grond van de erkenning van het recht op territoriale wateren in het algemeen, n.l. de wenschelijkheid, dat het VÓÓR de kust gelegen water tot dezelfde overeenkomst als de kust zelve behoort. Dit beginsel komt bij afwijking van de loodlijn niet tot zijn recht. Een volkomen vaste regel is echter in het Volkenrecht niet gegeven.

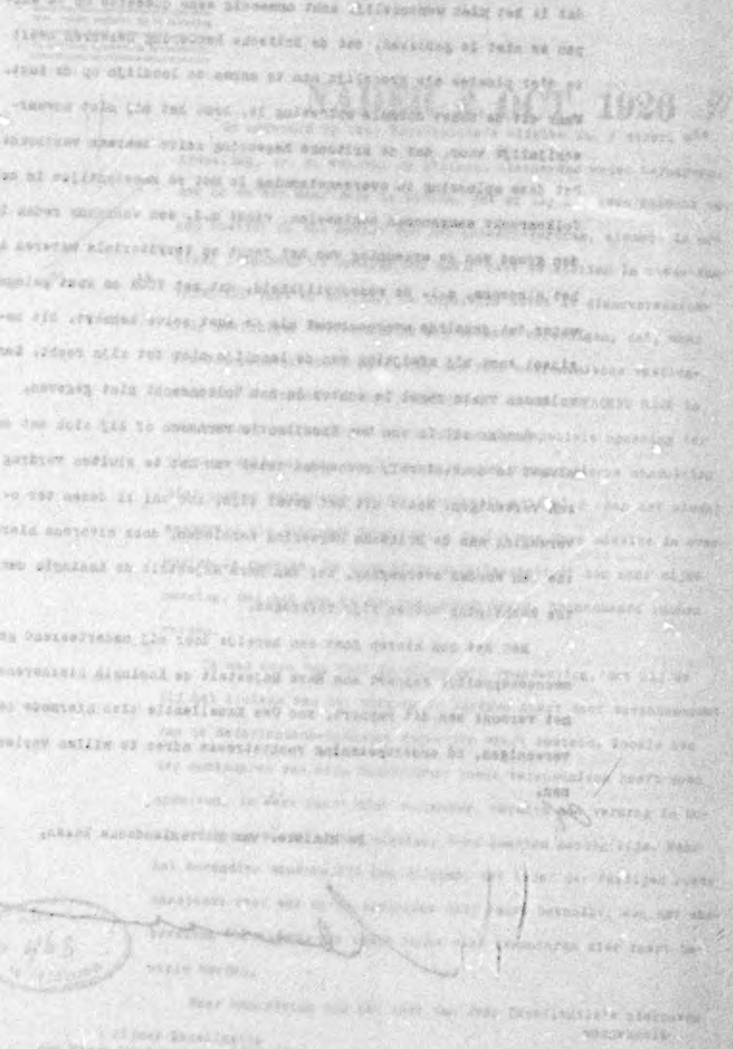
Gaarne zal ik van Uwe Excellentie vernemen of Zij zich met een alvast in druk hierbij gevoegden tekst van het te sluiten verdrag kan vereenigen. Mocht dit het geval zijn, zoo zal ik dezen ter overweging aan de Britsche Regeering aanbieden, doch alvorens hiertoe kan worden overgegaan, zal van Hare Majesteit de Koningin daartoe machtiging moeten zijn verkregen.

Met het oog hierop gaat een bereids door mij onderteekend gemeenschappelijk rapport aan Hare Majesteit de Koningin hiernevens met verzoek aan dit rapport, zoo Uwe Excellentie zich hiermede kan vereenigen, mê onderteekening rechtstreeks adres te willen verleenen.

De Minister van Buitenlandsche Zaken,

Annex MCM 8

DECISION OF THE MINISTER OF COLONIES, 2 OCTOBER 1926



Decision of the Minister of Colonies, dated 2 October 1926.

Translation provided by Malaysia. Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2877.

"THE MINISTER OF COLONIES,

Having read:

A letter of the Minister of Foreign Affairs dated 27 September 1926

Dept Legal Affairs no. 27518;

(Exh. 28 Sep. 1926.no 1)

In view of:

Vb. 7 Se. 1926 no. 8;

HAS APPROVED:

1. [..................................]
2. to write:

a. To His Excellency Minister of Foreign Affairs

[.......................................]

The content of your letter regarding the border between the Dutch and British territorial waters off the east coast off the island Sebitik has confirmed my first impression that any further settlement of the issue is not urgent.

I shall inform the Governor-General of the Netherlands East Indies accordingly.

The Min. of Col.

b. To His Excellency the Governor-General of the Netherlands East Indies

[.......................................]

The content of the cited letter from Baron van Karnebeek regarding the border between the Dutch and British territorial waters off the east coast off the island Sebitik has confirmed my first impression that any further settlement of the issue is not urgent. I shall inform the Governor-General of the Netherlands East Indies accordingly. The matter can hence be left in abeyance.

The Min. of Col."

Original text in Dutch:

"DE MINISTER VAN KOLONIEN,

Gelezen:

Een schrijven van den Minister van Buitenlandsche Zaken dd. 27 Sept.' 26

Afd. Juridische Zaken no. 275518;

(Exp. 28 Sep. 1926 no. 1);

Gelet op:

Vb. 7 Sep. 1926 no. 8;

HEEFT GOEDGEVONDEN

1. [.................................]

2. te schrijven:

a. Aan Z.E. den Minister van Buitenlandsche Zaken

[...........................]

Hetgeen in Uwen brief wordt medegedeeld inzake de grens tusschen de Nederlandsche en Britsche territoriale wateren aan de Oostkust van het eiland Sibetik heeft mijn voorloopige zienswijze bevestigd, dat een nadere regeling dienaangaande niet urgent is.

Ik stel de Gouverneur-Generaal van Nederlandsch-Indie hiermede in kennis.

De M.v.K.

b. Aan Z.E. den Gouverneur-Generaal van Nederlandsch-Indie.

[............................]

Hetgeen in aangehaald schryven van Jhr. Van Karnebeek wordt medegedeeld inzake de grens tusschen de Nederlandsche en Britsche territorile wateren aan de Oostkust van het eiland Sibetik heeft mijn voorlopige zienswijze bevestigd, dat een nadere regeling niet urgent is. Deze aangelegenheid blijft dus verder rusten.

De M.v.K."

Inzage Kabinet (tel. ook No)

DEPARTEMENT VAN KOLONIËN.

's-Gravenhage, den 2 Oct. 1926

4e Afdeeling

Nº. 41/1191

Onderwerp:
Grenskwesties op Borneo.

Aant. bij Afd.

Kab. tel.

BIJLAGEN:
met 2e /b:
afschr.exh.28 Sept.1926 no.1.

Verzonden 5 OCTOBER 1926

2e/b MAIL.

To TELEGRAM.

Dr. J

DE MINISTER VAN KOLONIËN,

Gelezen:
een schrijven van den Minister van Buitenlandsche Zaken dd.27 Sept.'26 Afd.Juridische Zaken no.27518;
(Exh.28 Sep.1926 no.1);
Gelet op;
Vh.7 Sep.1926 no.8;

HEEFT GOEDGEVONDEN:

1o: te bepalen, dat inliggend gemeenschappelijk rapport na mede-onderteekening door den Minister aan zijn bestemming wordt doorgezonden.

2o : te schrijven:

a. A a n Z.E.den Minister van Buitenlandsche Zaken.

Naar aanleiding van Uw schrijven van 27 September jl., Afdeeling Juridische Zaken no.27518, betreffende de grensregeling op Borneo, heb ik de eer Uwer Excellentie mede te deelen, dat het daarbij gevoegd, aan Hare Majesteit de Koningin gericht rapport, na door mij te zijn onderteekend, aan zijn bestemming is doorgezonden.

Het

DE MINISTER VAN KOLONIEN,

Gelezen:

Een schrijven van den Minister van Buitenlandsche [illegible]

Afd. Juridische Zaken no. 27518;

(Exp. 25 Sep. 1926 no. 1);

Gelet op

Vb. 7 Sep. 1926 no. 8;

HEEFT GOEDGEVONDEN:

1. [illegible]

2. te schrijven

[illegible]

Met den bij Uw schrijven in druk gevoegden tekst van het te sluiten verdrag kan ik mij vereenigen.

Hetgeen in Uwen brief wordt medegedeeld inzake de grens tusschen de Nederlandsche en Britsche territoriale wateren aan de Oostkust van het eiland Sibetik heeft mijn voorloopige zienswijze bevestigd, dat een nadere regeling dienaangaande niet urgent is.

Ik stel den Gouverneur-Generaal van Nederlandsch-Indië hiermede in kennis.

De M.v.K.,

Aan Z.E. den Gouverneur-Generaal van Nederlandsch-Indië.

Ten vervolge op mijn brief van 7 September jl., 4e Afdeeling no. 6/1073 betreffende de grensregeling op Borneo, heb ik de eer Uwer Excellentie hierbij in afschrift te doen toekomen een nader ter zake handelend schrijven van mijn ambtgenoot van Buitenlandsche Zaken dd. 27 September jl., Afdeeling Juridische Zaken no. 27518.

Overeenkomstig het daarin vervat verzoek heb ik de eer Uwe Excellentie uit te noodigen, van de op duurzaam papier te drukken kaart niet een exemplaar, maar vier exemplaren herwaarts te willen doen opzenden. Spoedshalve bracht ik bedoeld verzoek reeds bij mijn telegram van heden no......aan U over.

Hetgeen in het aangehaald schrijven

van

van van Jhr.van Karnebeek wordt medegedeeld inzake de grens tusschen de Nederlandsche en Britsche territoriale wateren aan de Oostkust van het eiland Sibetik heeft mijn voorloopige zienswijze bevestigd,dat een andere regeling dienaangaande niet urgent is. Deze aangelegenheid blijft dus verder rusten.

De M.v.K.,

Zo: te seinen:

~~100~~ DLY

landvoogd batavia

nummer. 1010. vervolg missive zeven september nopens grensregeling borneo wil van op duurzaam papier te drukken kaart vier exemplaren spoedigst herwaarts zenden

koningsberger

De M.v.K.,

TELEGRAM
VERZONDEN
2 October 1926

1/10 .26

2/10

M 1/10

Annex MCM 9

NORTH BORNEO, FAUNA CONSERVATION ORDINANCE 1963

COLONY OF NORTH BORNEO

LS

I assent,

W. A. C. GOODE,
Governor.

28th JUNE, 1963.

No. 11 of 1963

An Ordinance to consolidate and amend the law for the protection and conservation of certain species of wild animals and birds; and for purposes connected therewith and incidental thereto.

15. 7. 1964.
[~~To be notified~~] **Date of commencement.**
3. 91/64.

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

SECTION
1. Short title and commencement.
2. Interpretation.
3. Non-application.

to them in respect of such exercise or performance by the Chief Game Warden.

Subs En. 5/52

(3) ~~Game Wardens and Game Rangers~~ shall be deemed to be public servants within the meaning of the Penal Code

No. 3 of 1959.

(En 15/[illegible]) → GA [illegible]

Declaration of Sanctuaries.

7. (1) Upon the recommendation of the Chief Game Warden, the ~~Governor in Council~~ may, after such inquiry as he may deem necessary, declare any area to be a Game Sanctuary or a Bird Sanctuary.

(2) A declaration under subsection (1) of this section shall be published in the *Gazette* and shall not have effect until after the expiration of a period of four weeks from the date of such publication.

(3) Nothing in this section shall be construed as preventing an area from forming a part or the whole of both a Game Sanctuary and a Bird Sanctuary.

(4) Any bird sanctuary declared as such under the provisions of the Wild Animals and Birds Preservation Ordinance and in existence as such at the date of commencement of this Ordinance shall be deemed to have been so declared under the provisions of subsection (1) of this section.

(5) Upon the recommendation of the Chief Game Warden, the ~~Governor-in-Council~~ may, by notice in the *Gazette*, declare that any Sanctuary shall cease to be a Sanctuary and may alter the boundaries of any Sanctuary:

Provided that the provisions of subsection (1) of this section shall apply to any such alteration of boundaries which has the effect of including in a Sanctuary any area which was not so included prior to such alteration.

PART III

LICENCES

Issue of licences.

8. (1) Subject to the provisions of subsection (2) of section 6 of this Ordinance, the following licences may be issued to any person by ~~a Game Warden in this~~ absolute discretion

subs. En. 5/52

(*a*) a "game licence" which shall authorise the licensee to hunt the types and numbers of game animals specified therein:

Provided that no game licence shall authorise the hunting of female elephant;

(*b*) a "forest game licence" which shall authorise the licensee to hunt, in a reserved forest, the types and

MAP 1

Survey Map of Netherlands East Indies Archipelago (1897 - 1904)

MAP I

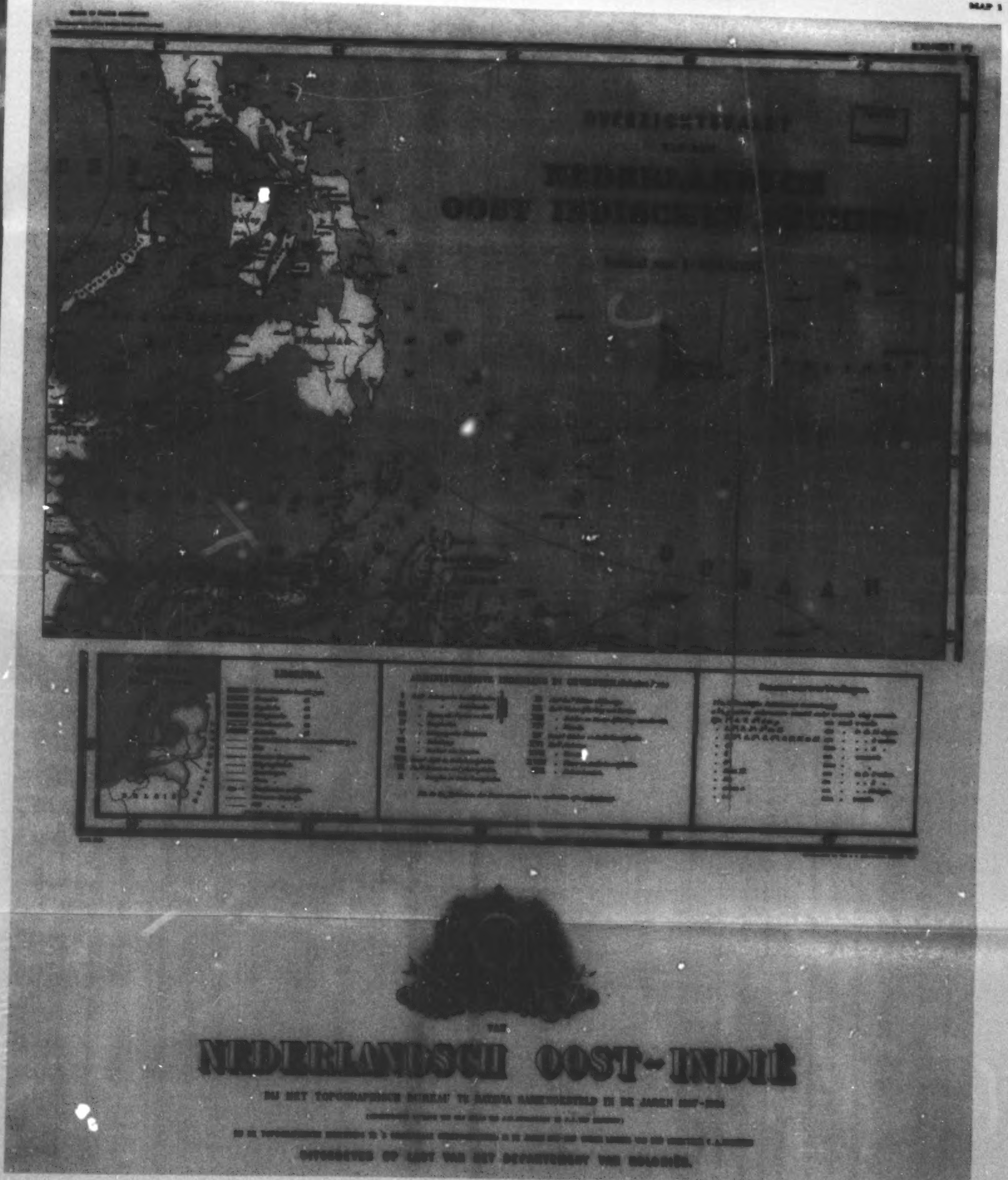
M of Netherlands East Indies:

MAP 1

OVERZICHTSKAART
VAN
NEDERLANDSCH OOST-INDIË

MAP 1

MAP 1

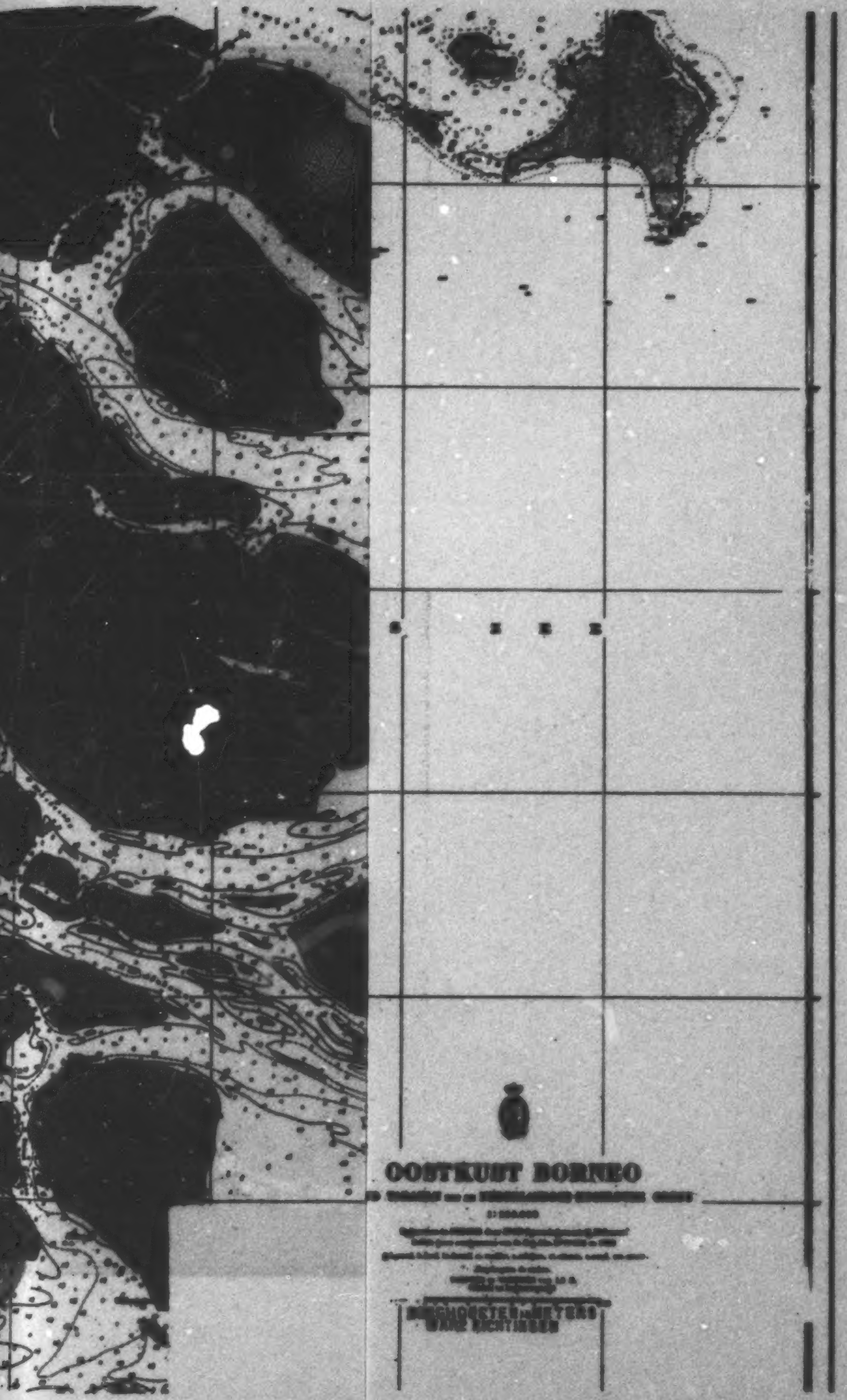

OVERZICHTSKAART
VAN DEN
OOST INDISCHEN ARCHIPEL
LEGENDA
VAN
NEDERLANDSCH OOST-INDIË
BIJ HET TOPOGRAPHISCH BUREAU TE BATAVIA SAMENGESTELD IN DE JAREN
UITGEGEVEN OP LAST VAN HET DEPARTEMENT VAN KOLONIËN.

MAP 1

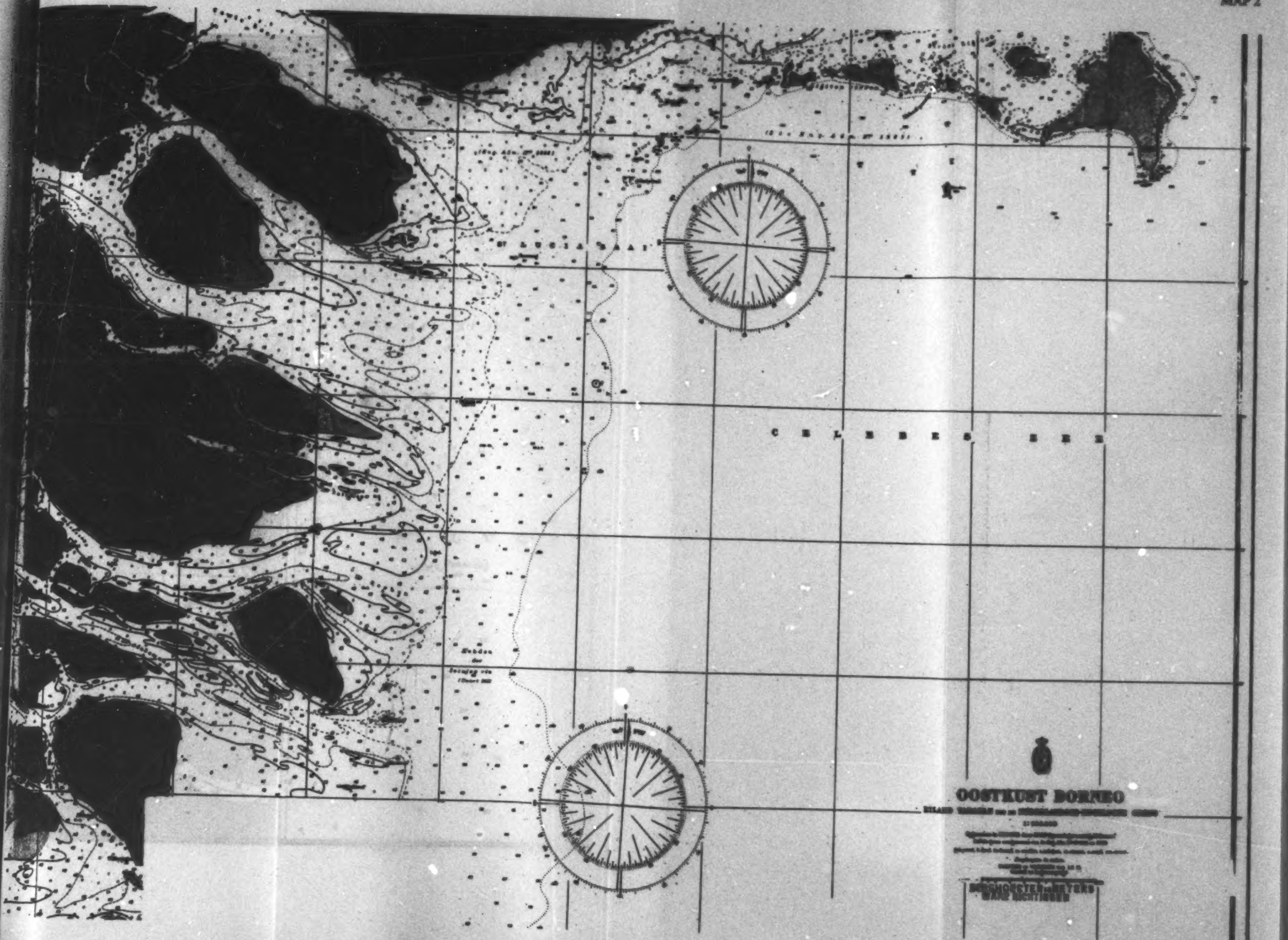
MAP 2

East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary (1905)

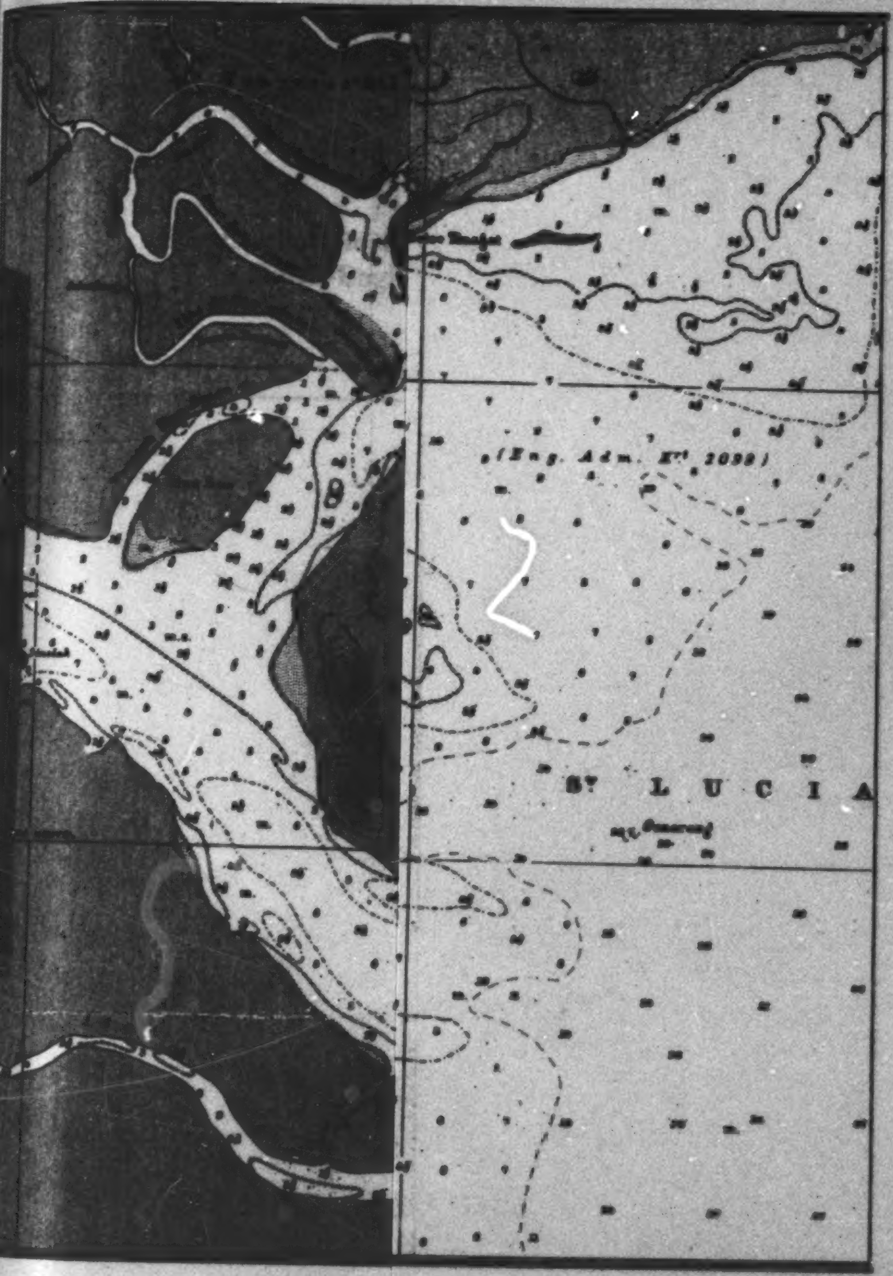
MAP 2


OOSTKUST BORNEO

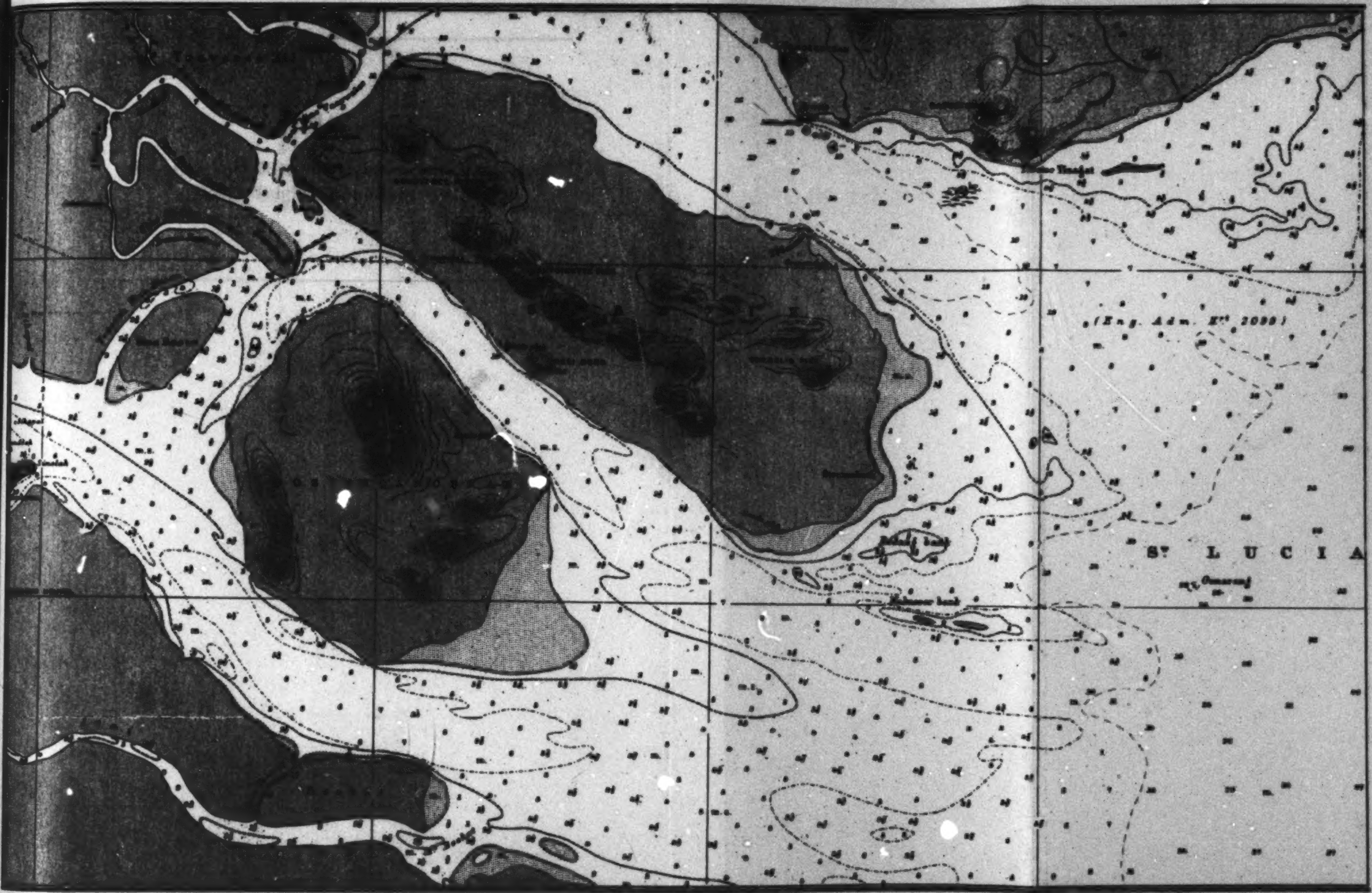
MAP 2


ST LUCIA BAAI
CELEBES ZEE
OOSTKUST BORNEO

MAP 2 (Enlargement)


(Eng. Adm. Chᵗ 2098)
Sᵀ LUCIA

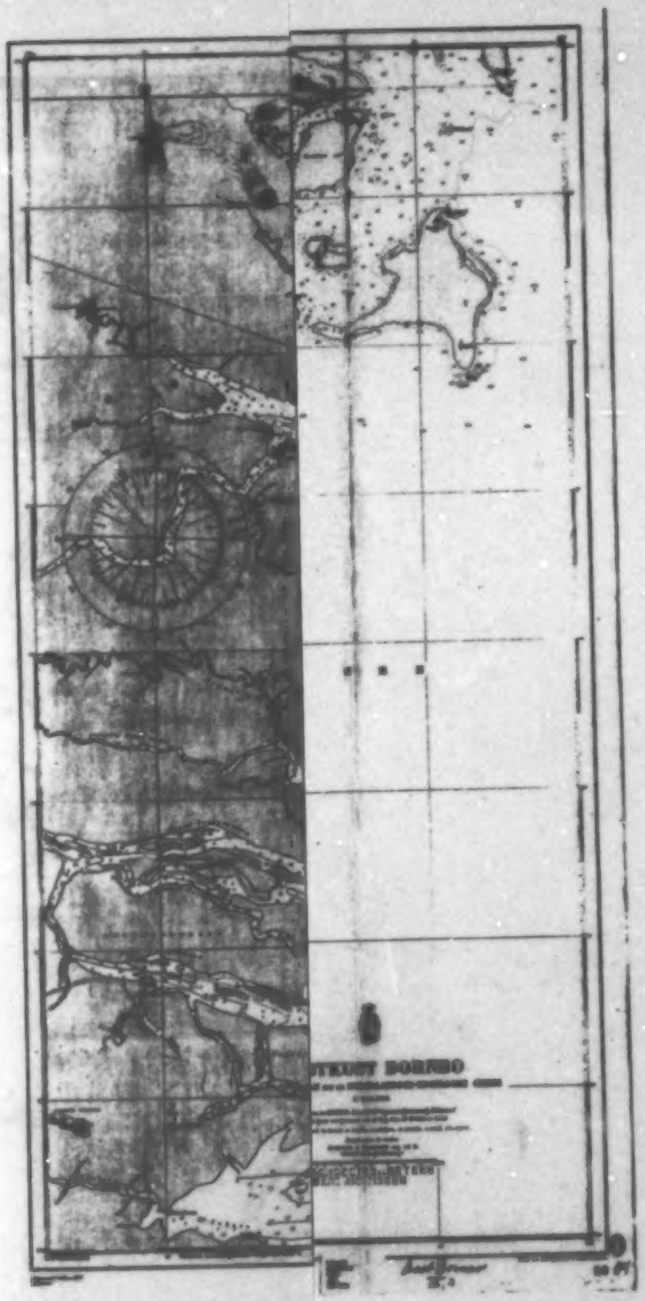
MAP 2 (Enlargement)

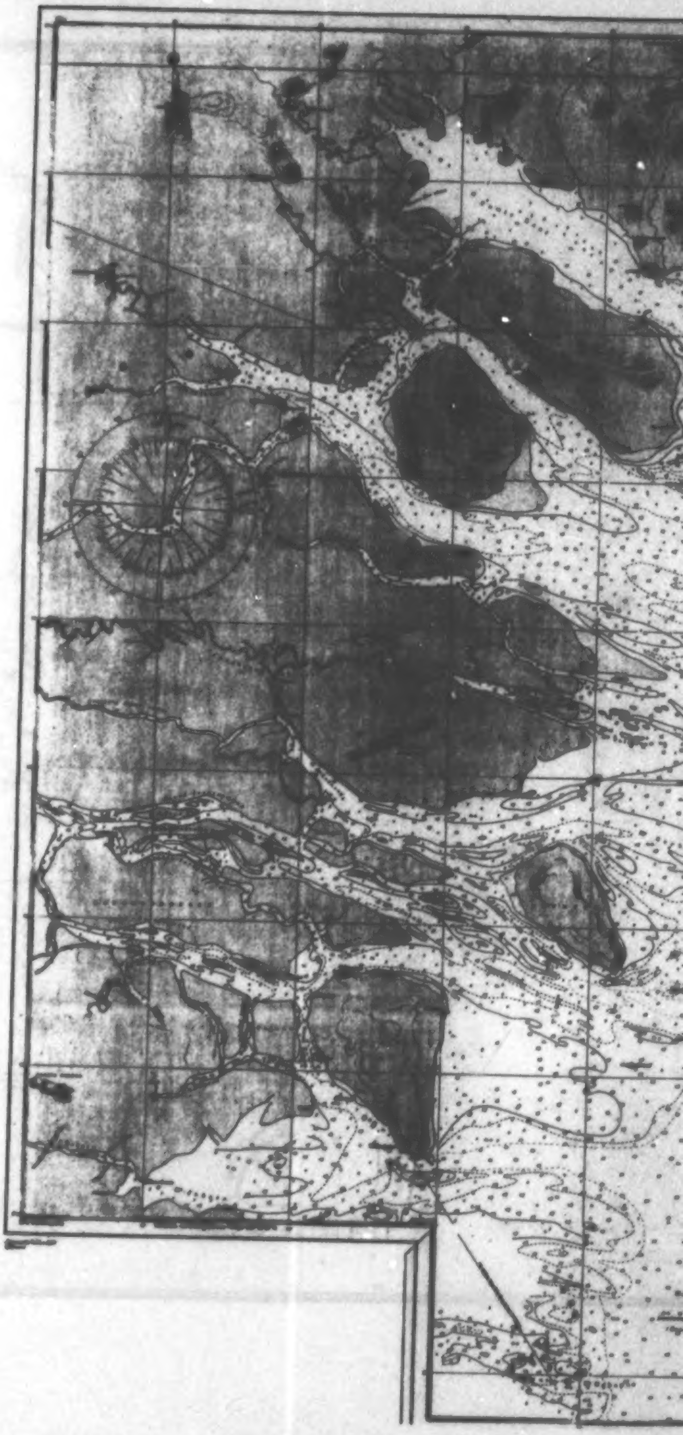

(Eng. Adm. Nr 2099)
St LUCIA

MAP 3

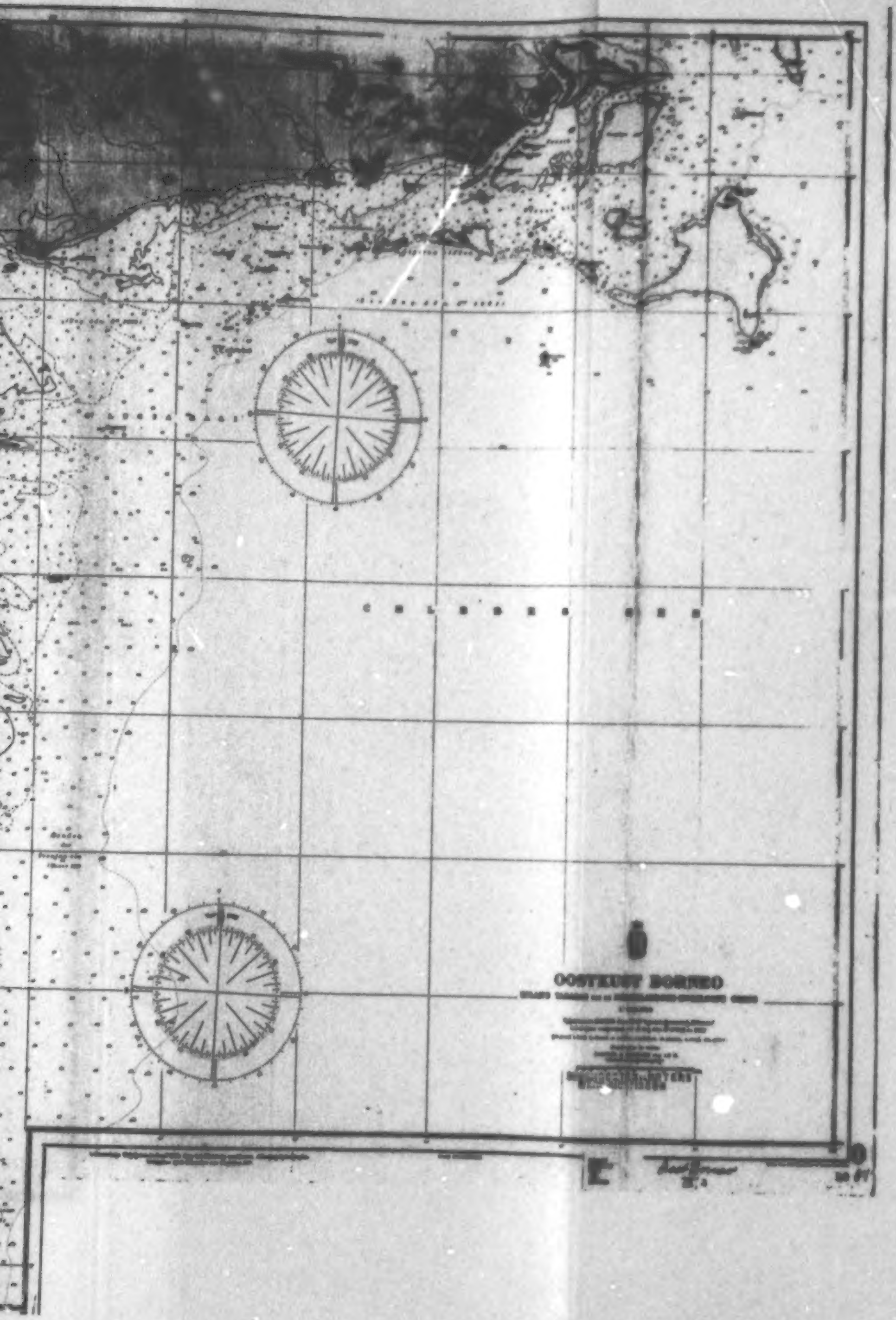
East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary (1915)

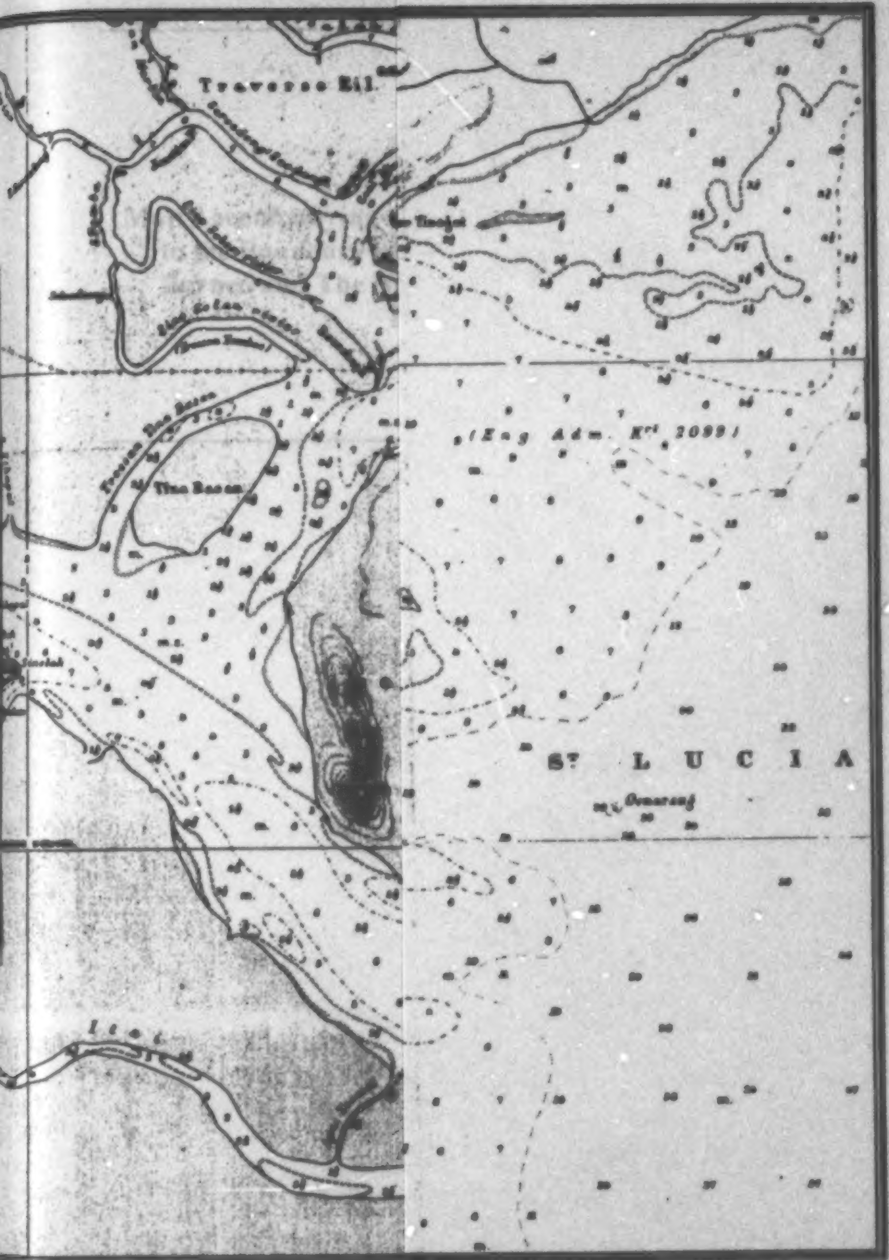
MAP 3


TKUST BORNEO

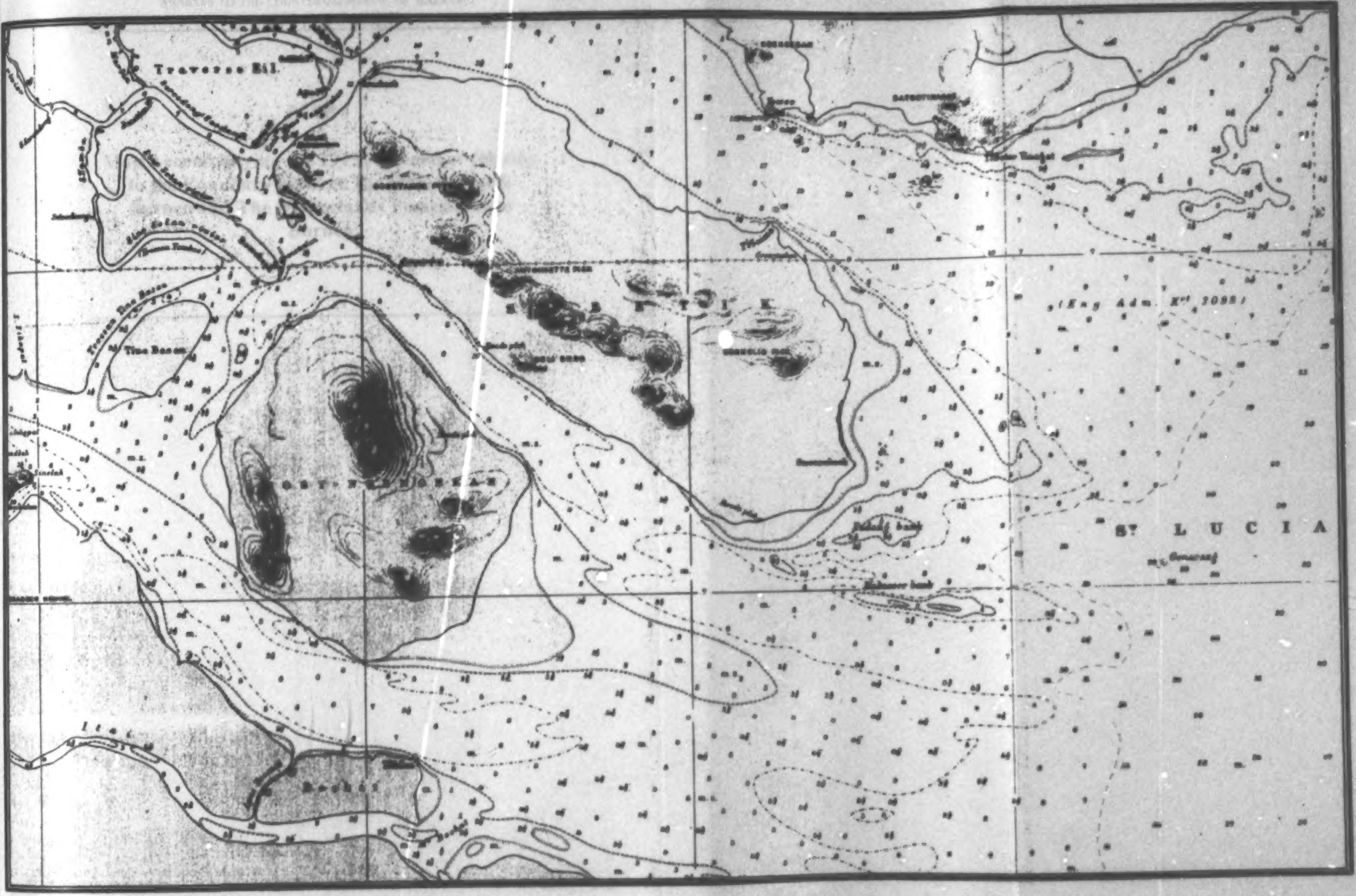


MAP 3


OOSTKUST BORNEO


Traverse Eil.
Tina Besar
(Eng Adm. Kᵗ 2099)
Sᵀ LUCIA
Oomarang

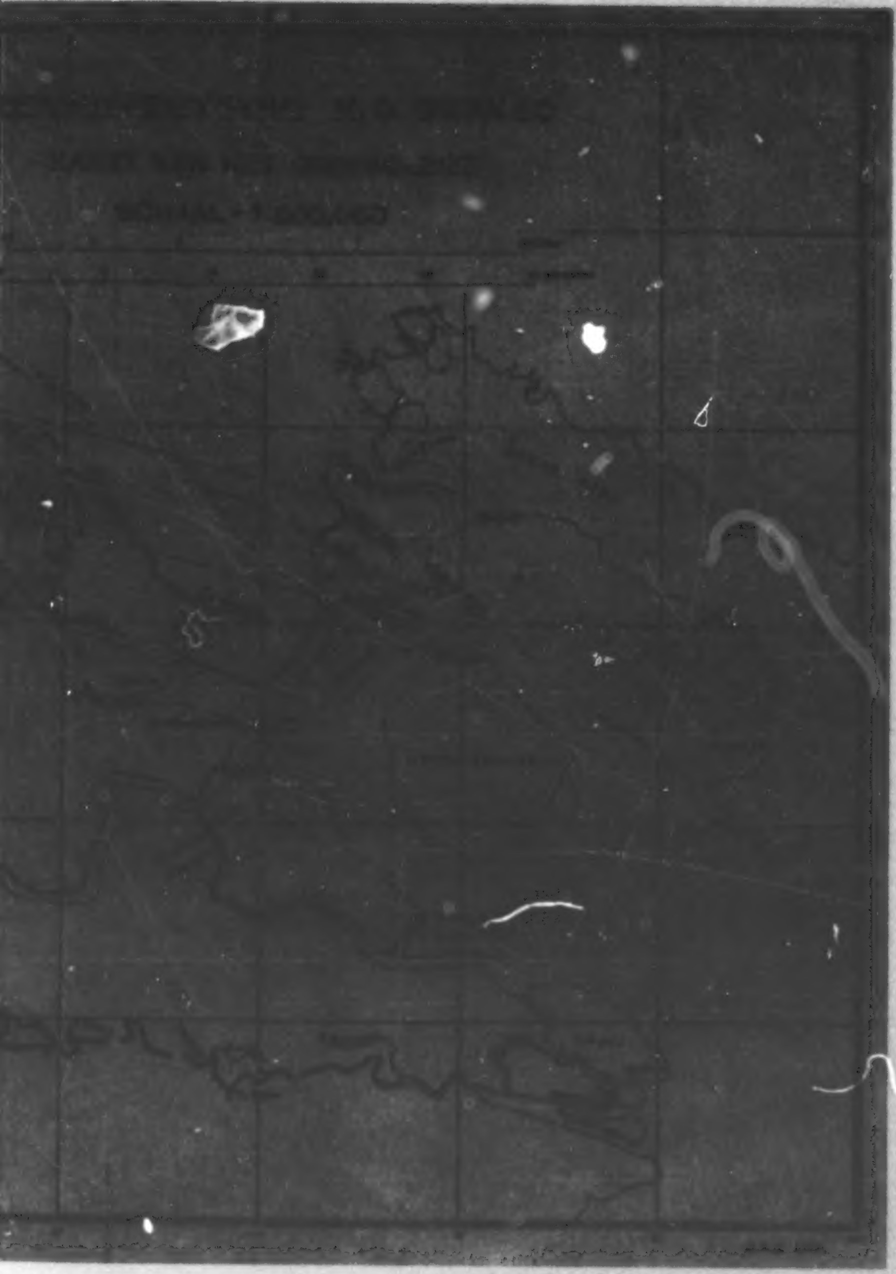
MAP 3 (Enlargement)


Traverse Bil
Tina Basan
(Eng Adm Kt 2098)
ST LUCIA
Itat

MAP 4

Map Accompanying the 1915 Agreement relating to the Boundary between the State of North Borneo and The Netherlands Possessions in Borneo

MAP 4



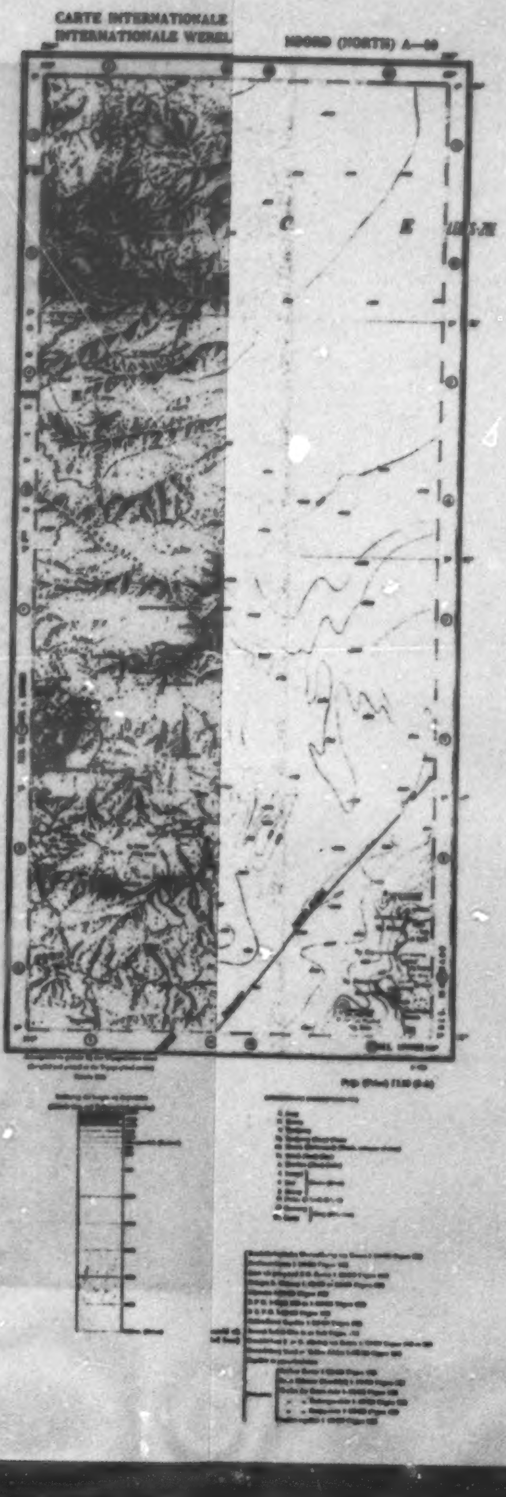
MAP 4

GRENSUITZETTING N.O. BORNEO
KAART VAN HET GRENSGEBIED
SCHAAL - 1:500,000

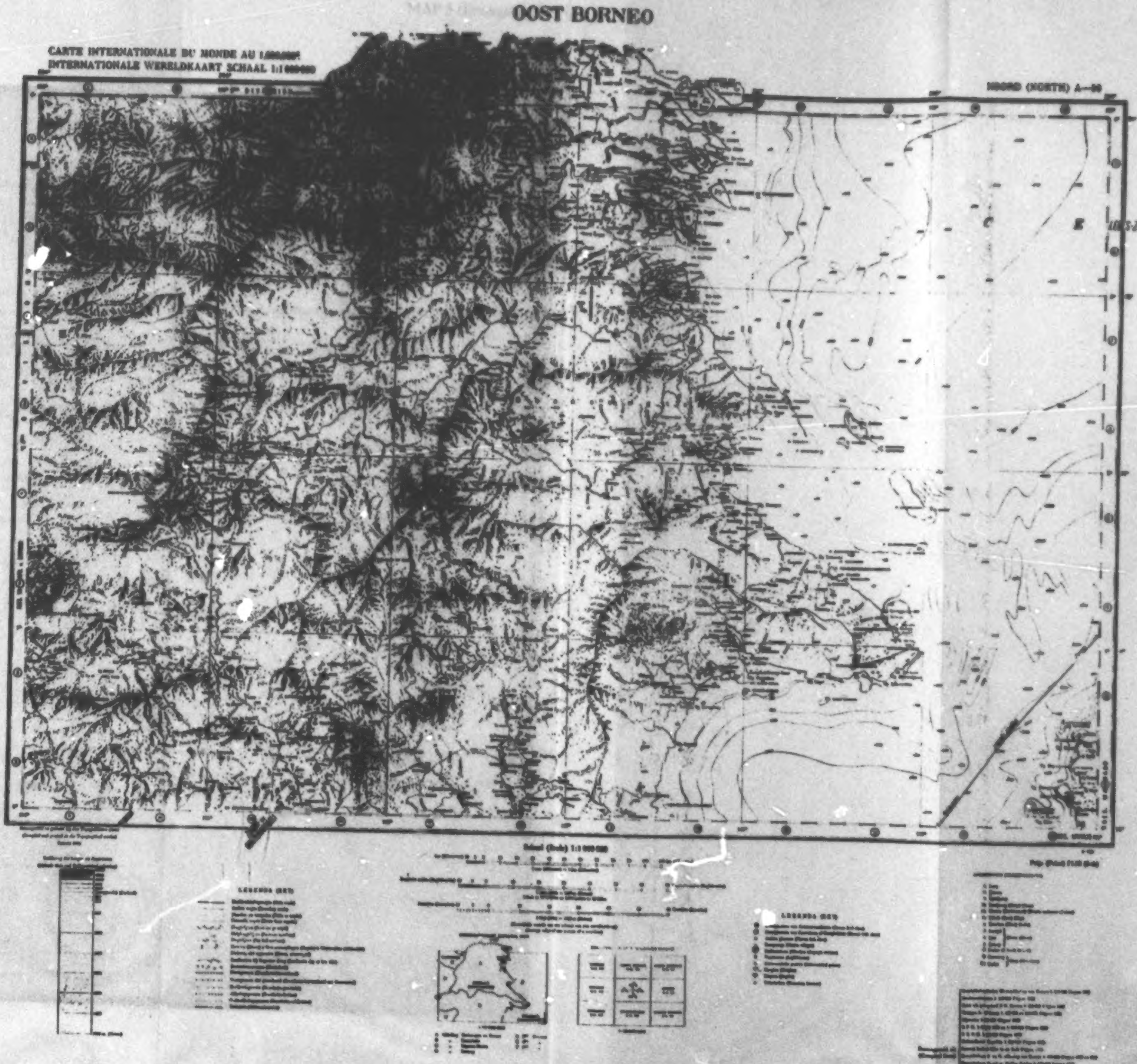
MAP 5

Sheet NA-50 "Oost Borneo" (1935)

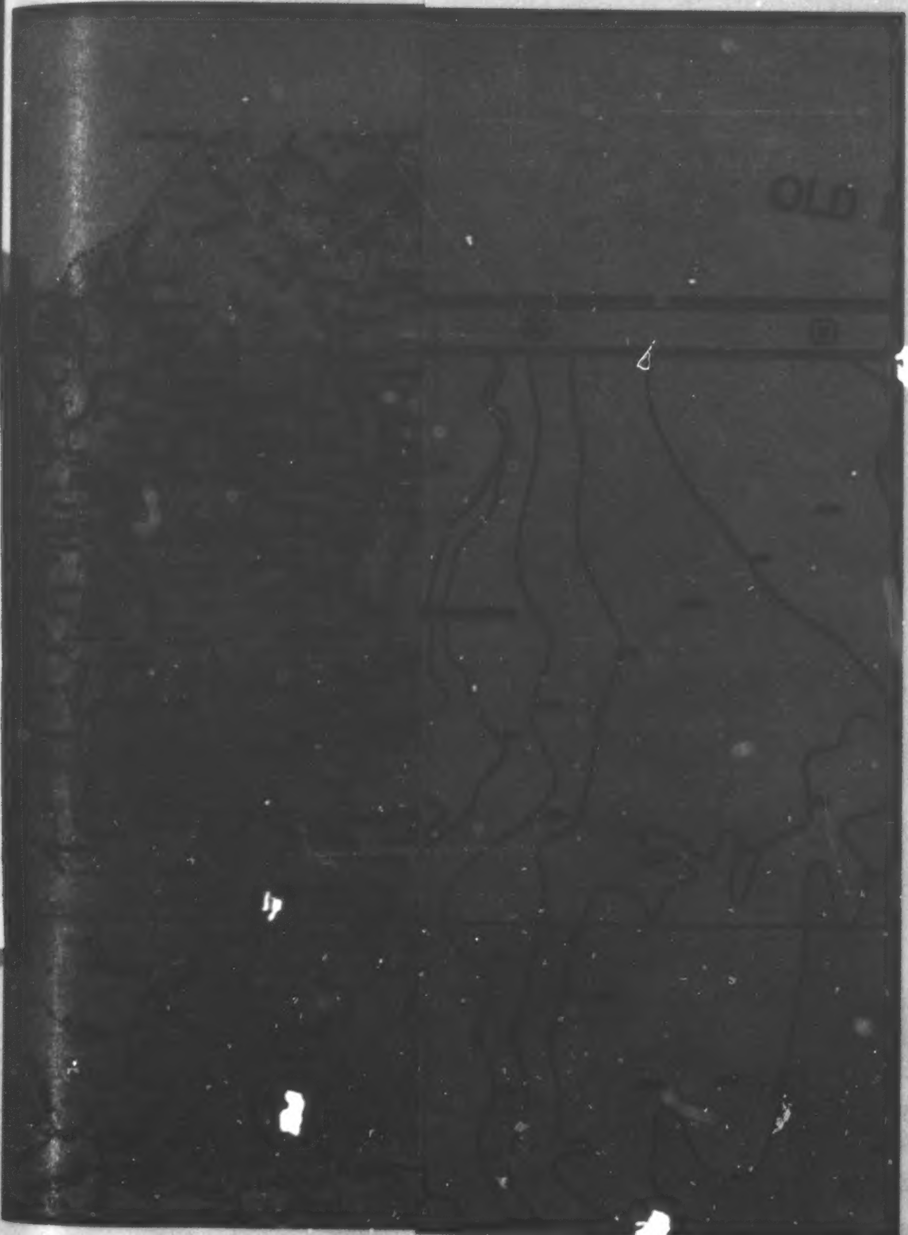
MAP 5


CARTE INTERNATIONALE
INTERNATIONALE WEREL
NOORD (NORTH) A—
C
E

MAP 5


OOST BORNEO
CARTE INTERNATIONALE DU MONDE AU 1.000.000e
INTERNATIONALE WERELDKAART SCHAAL 1:1 000 000
NOORD (NORTH) A-50
Schaal (Scale) 1:1 000 000
LEGENDA

MAP 5 (Enlargement)



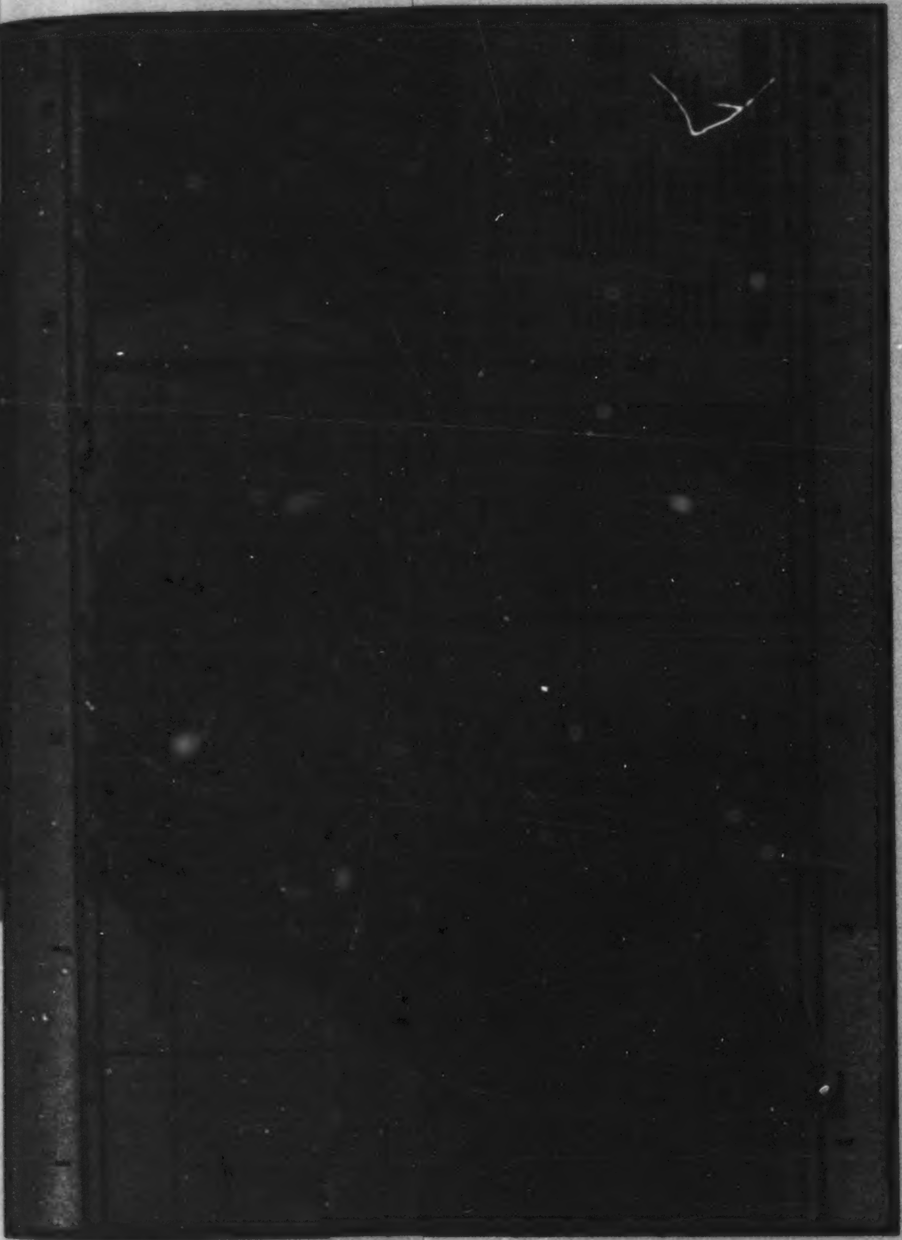
MAP 5 (Enlargement)

OOST BORNEO

MAP 6

Map 25, Atlas of the Tropical Netherlands (1938) (Extract)

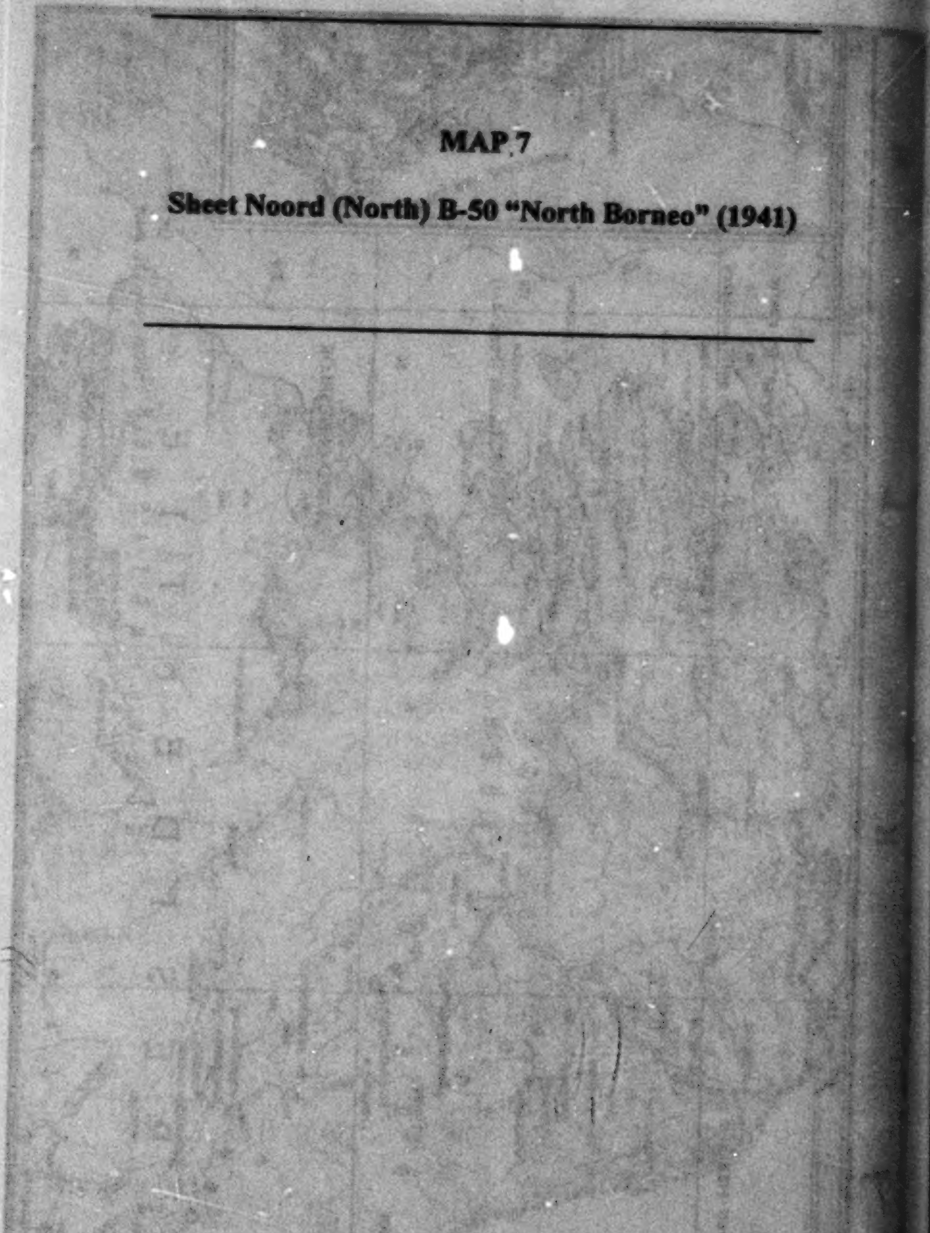
MAP 6



MAP 6 (Enlargement)

MAP 7

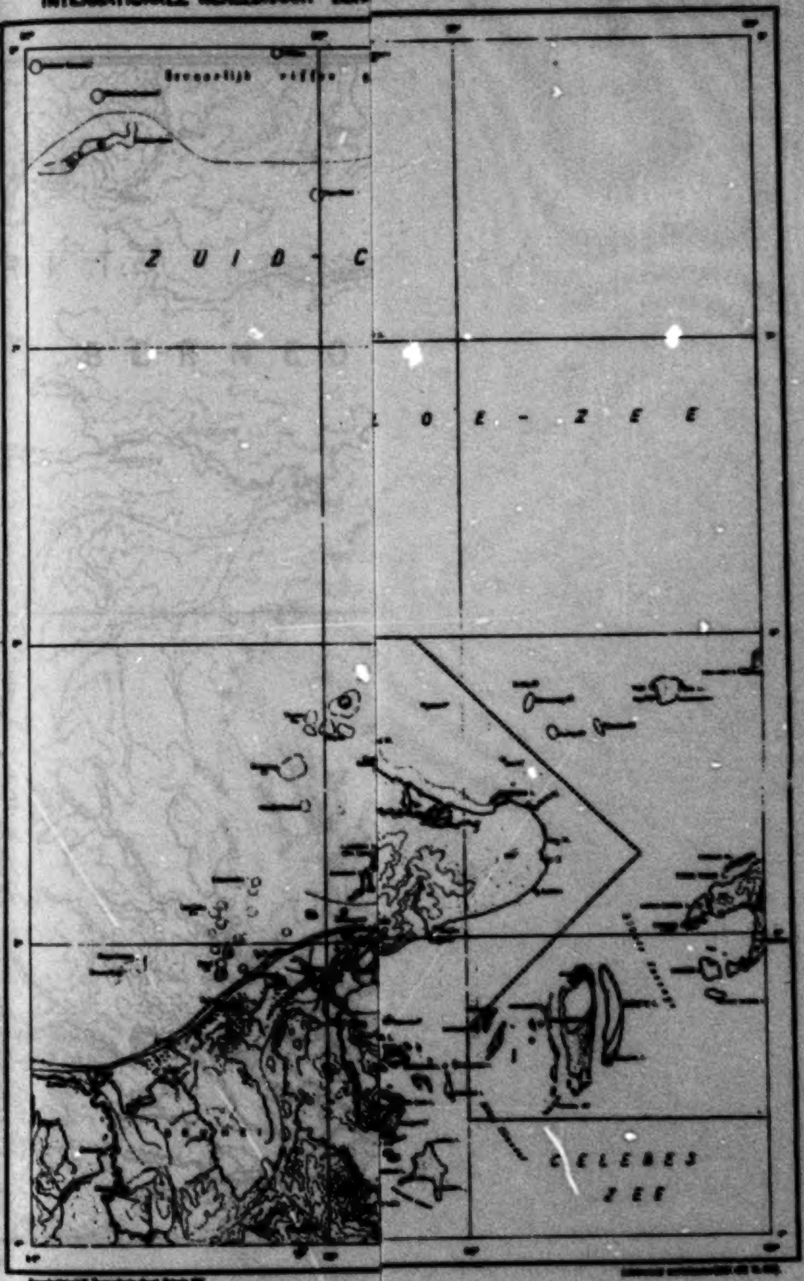
Sheet Noord (North) B-50 "North Borneo" (1941)



MAP 7

INTERNATIONALE WERELDKAART SCH

NOORD (NORTH) B—50.

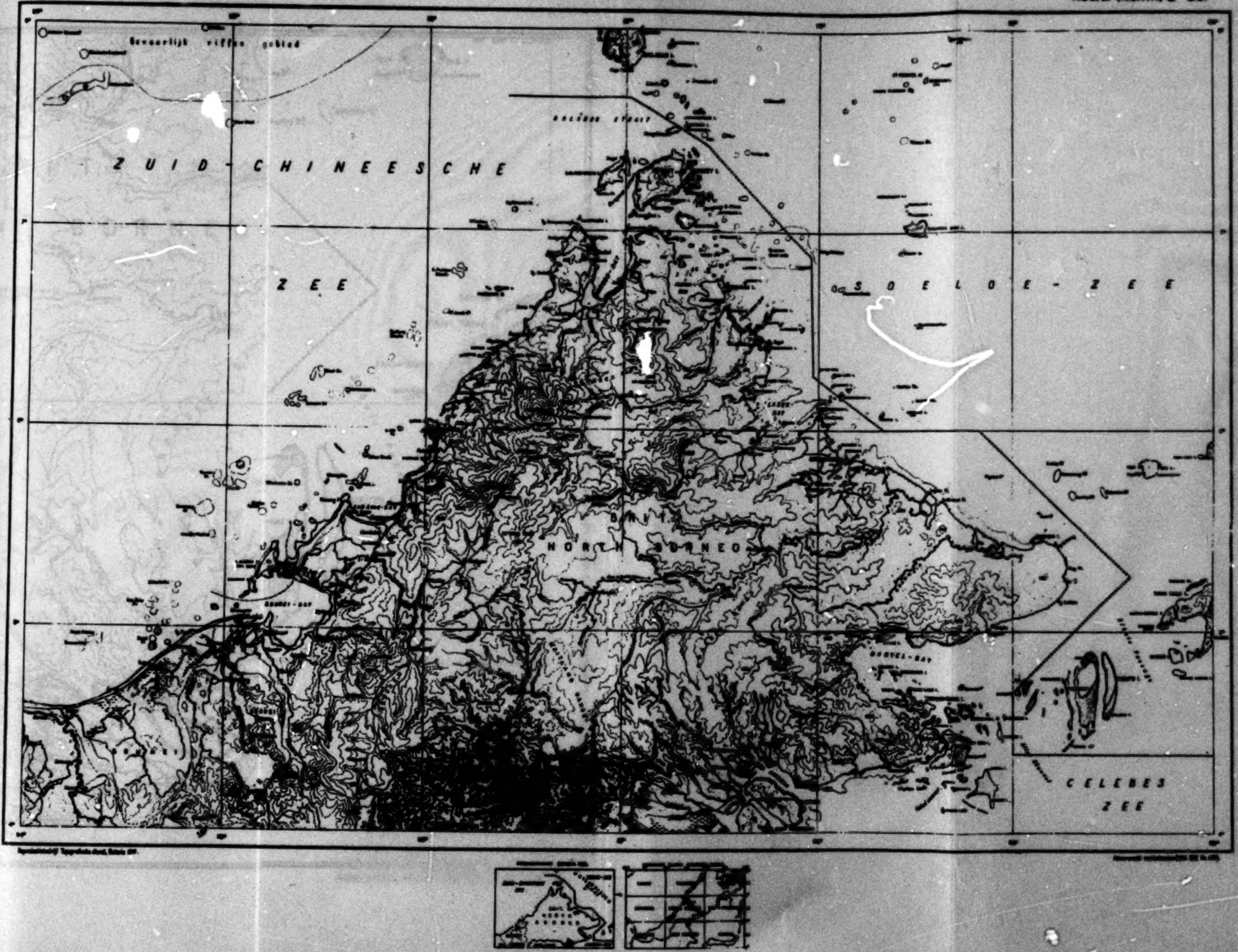

Vermoedelijk riffen
ZUID-C
LOE-ZEE
CELEBES ZEE

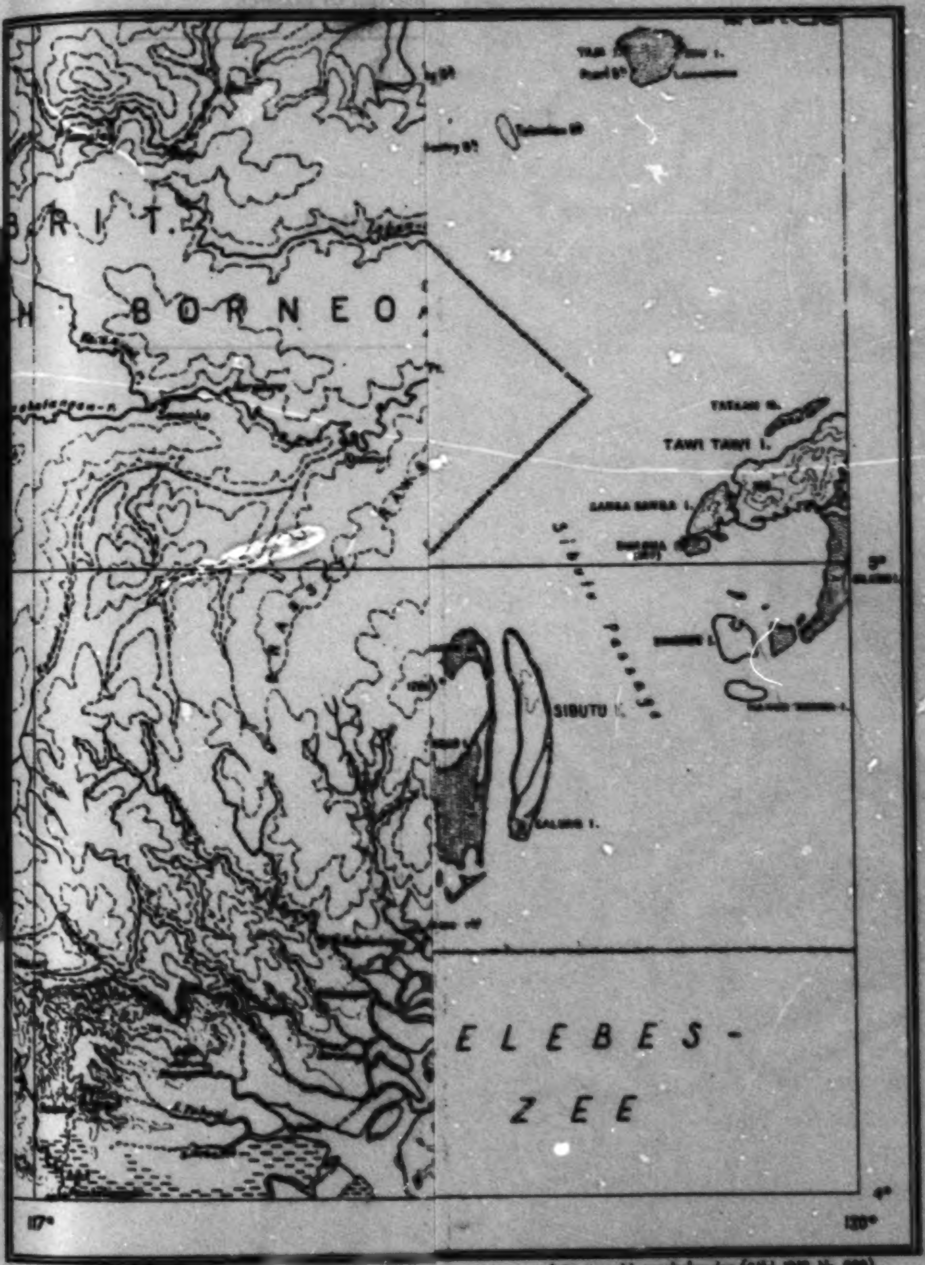
GEHEIM

NORTH BORNEO

INTERNATIONALE WERELDKAART SCHAAL 1:1000000.

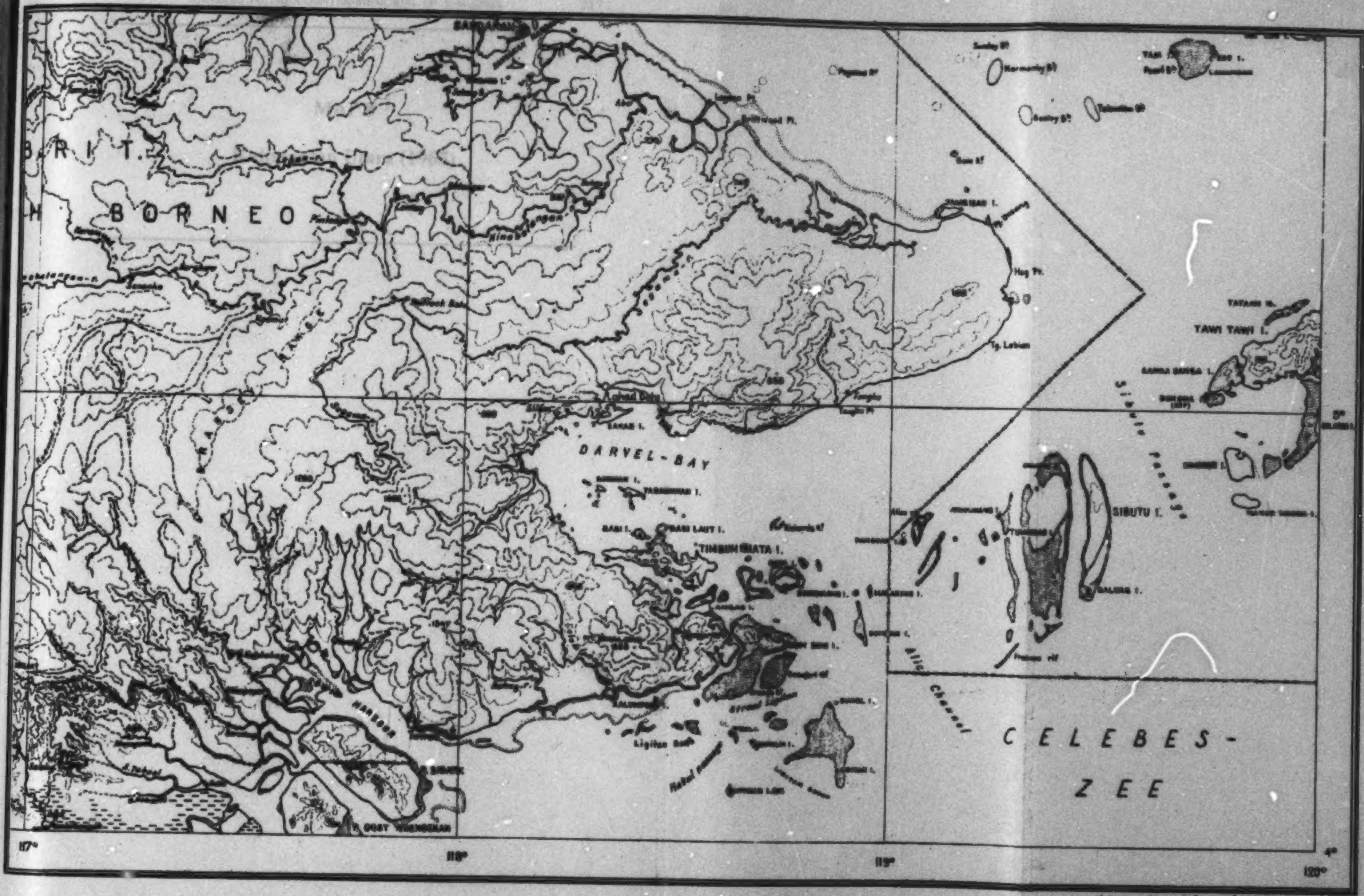
NOORD (NORTH) B-50.


Gevaarlijk gebied
ZUID-CHINEESCHE ZEE
SOELOE-ZEE
BRIT. NORTH BORNEO
CELEBES ZEE


B R I T.
BORNEO
TAWI TAWI I.
SIBUTU I.
Sibutu Passage
ELEBES-
ZEE
5°
4°
117°
120°

Auteursrecht voorbehouden (Stbl. 1912 No. 600).

MAP 7 (Enlargement)


SANDAKAN
BRIT.
BORNEO
Lahad Datu
Tungku
Tg. Labian
Hog Pt.
DARVEL-BAY
SAKAR I.
BAI I.
TIMBUN MATA I.
Ligitan Reef
HARBOUR
TAWI TAWI I.
TATAAN Is.
SANGA SANGA I.
SIBUTU I.
Sibutu Passage
Alice Channel
CELEBES-
ZEE
117°
118°
119°
120°
4°
5°

Auteursrecht voorbehouden (Stbl. 1912 No. 600).

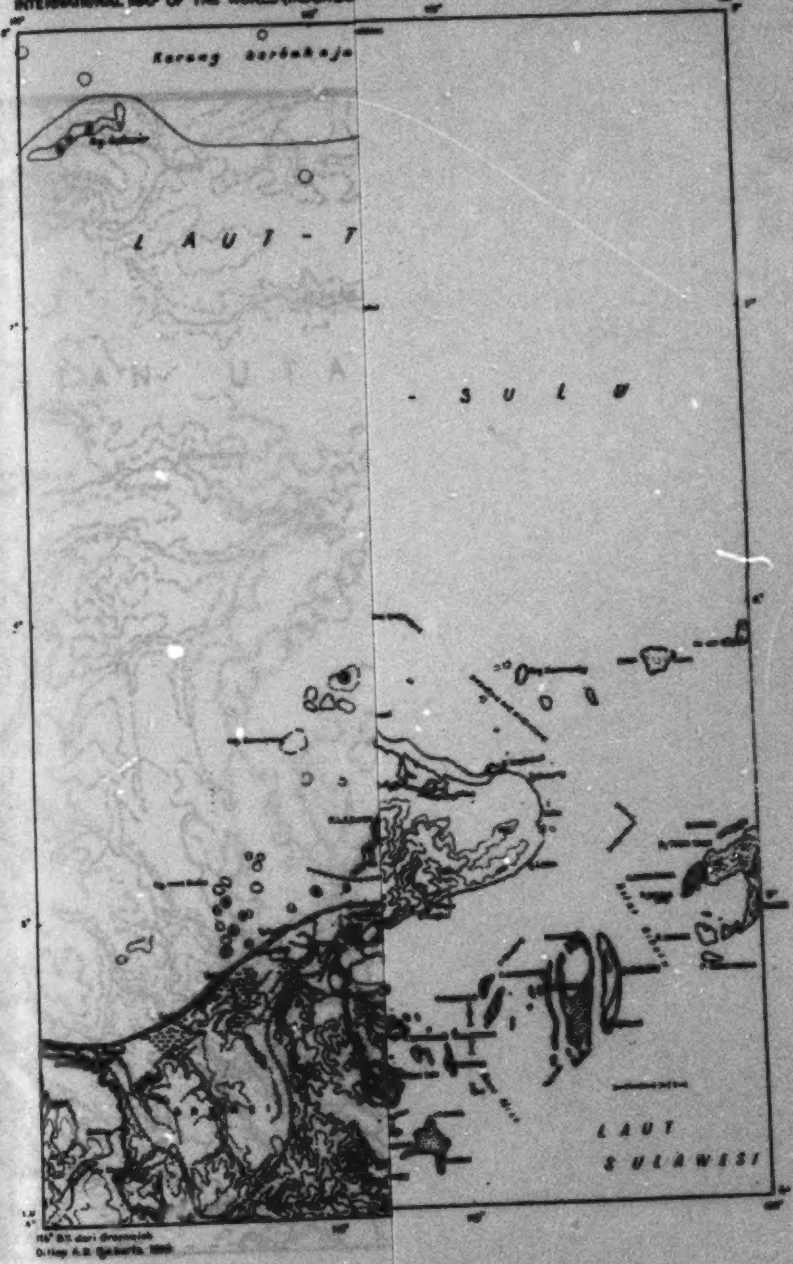
MAP 8

Kalimantan Utara (1965)

MAP 8

PETA INTERNASIONAL SEDUNIA 1:1.000.000
INTERNATIONAL MAP OF THE WORLD (INDONES

HELAI NB-50


Karang Berbahaja
LAUT-T
AN UTA
-SULU
LAUT
SULAWESI

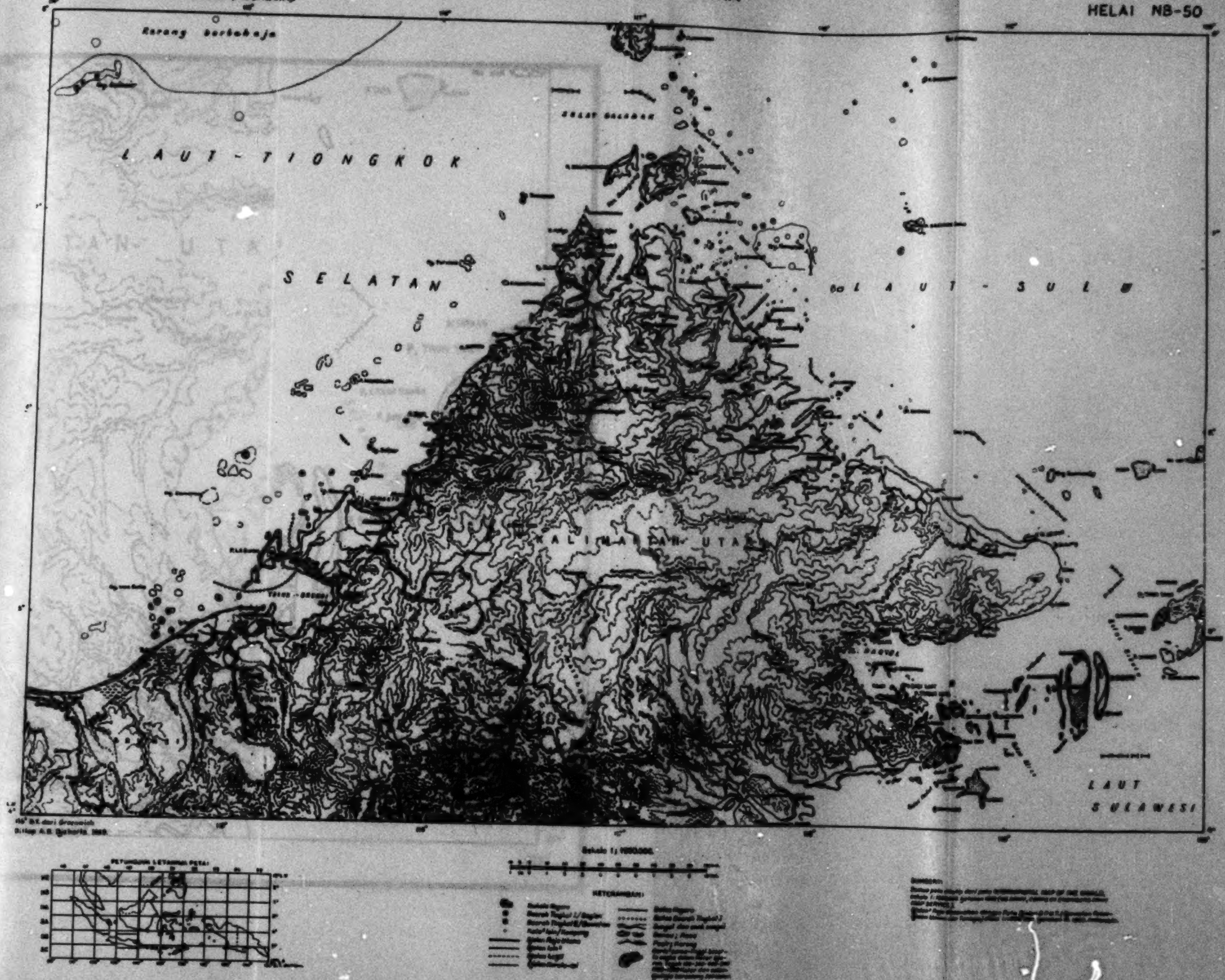
116° B.T. dari Greenwich

PETA INTERNASIONAL SEDUNIA 1:1000.000
INTERNATIONAL MAP OF THE WORLD (INDONESIA)

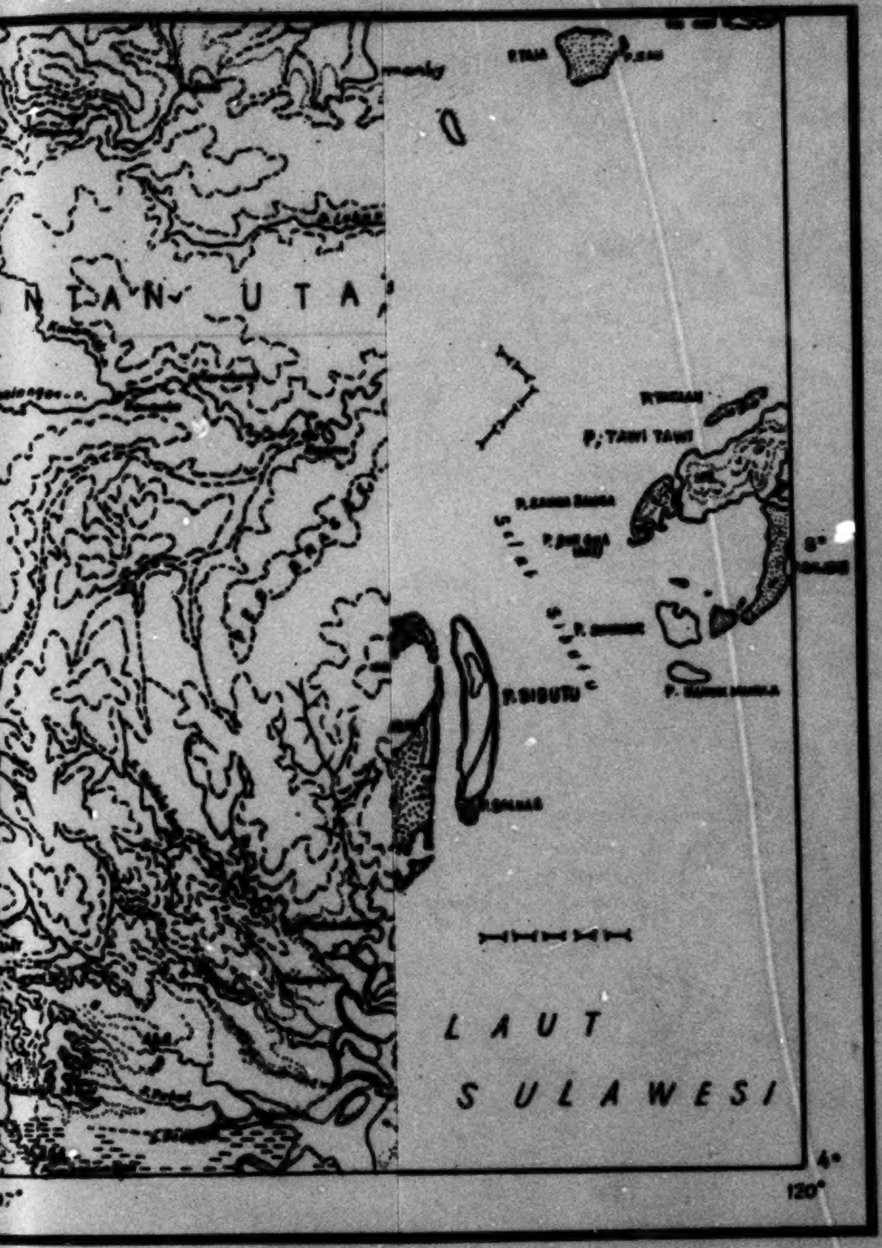
KALIMANTAN UTARA

HELAI NB-50

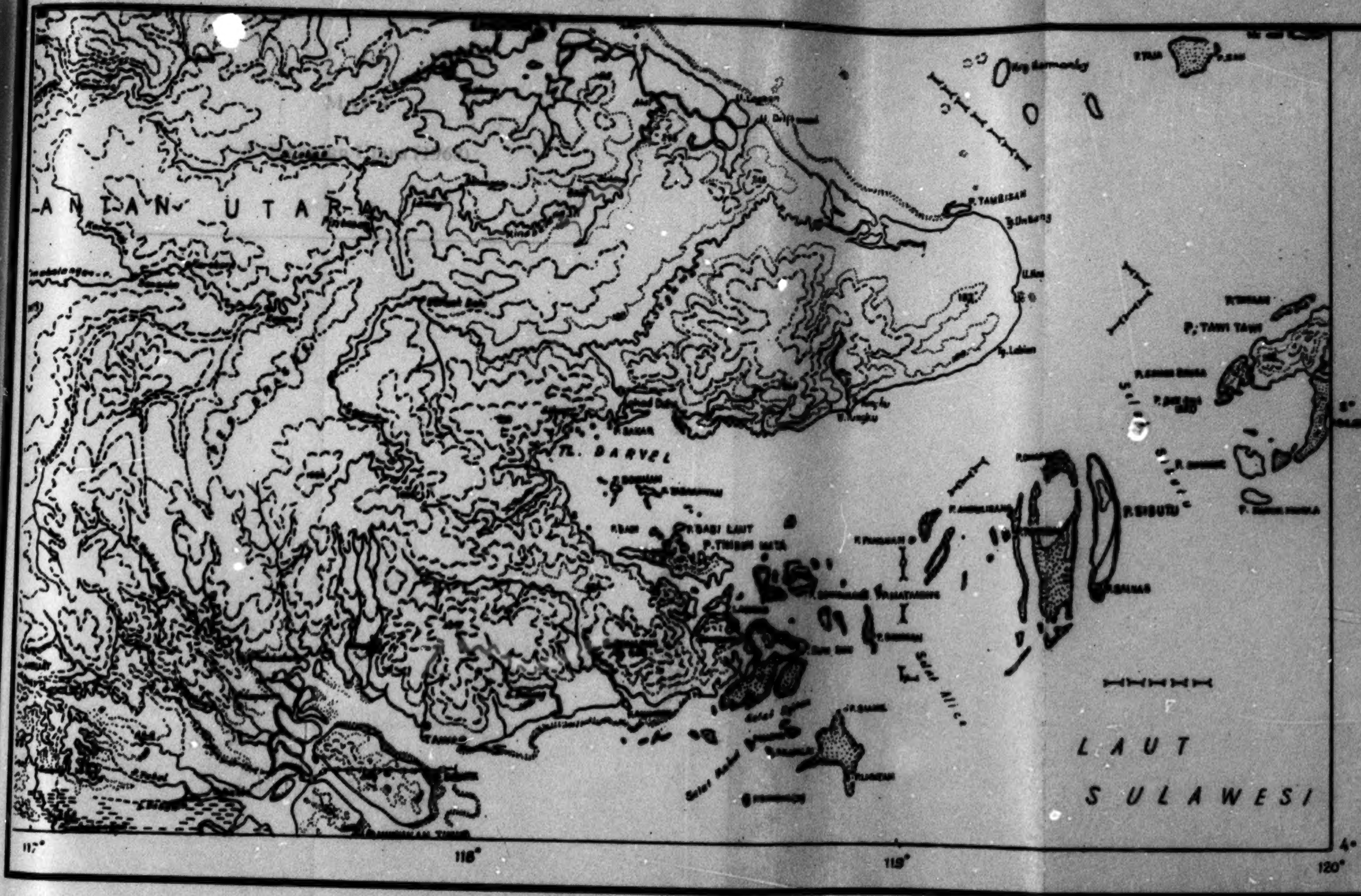
MAP 8


Karang berbahaja
LAUT-TIONGKOK SELATAN
LAUT-SULU
KALIMANTAN UTARA
LAUT SULAWESI
115° B.T. dari Greenwich
PETUNDJUK LETAKNJA PETA:
KETERANGAN:

MAP 8 (Enlargement)


NTAN UTA
P. TAWI TAWI
Selat Sibutu
P. SIBUTU
LAUT SULAWESI
5°
4°
120°

MAP 8 (Enlargement)


ANTAN UTAR
TL. DARVEL
P. TAMBISAN
Tg. Unsang
Tg. Labian
P. TAWI TAWI
P. SIBUTU
P. BONGAO
P. BABI LAUT
P. TIMBUN MATA
Selat Alice
Selat Sibutu
LAUT
SULAWESI
117°
118°
119°
120°
4°
5°

MAP 9

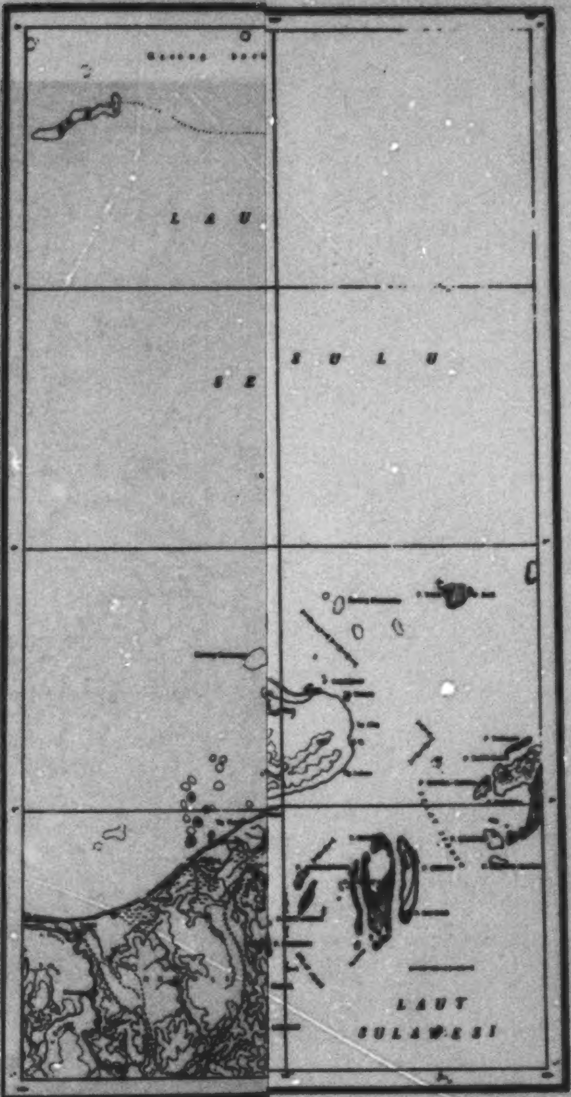
Kalimantan Utara (1968)

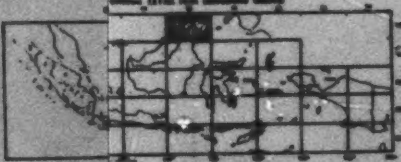
PETA INTERNASIONAL SEDUN

INTERNATIONAL MAP OF THE

HELAI NB 50

MAP 9


Gosong Bork
L A U
S E S U L U
L A U T
S U L A W E S I

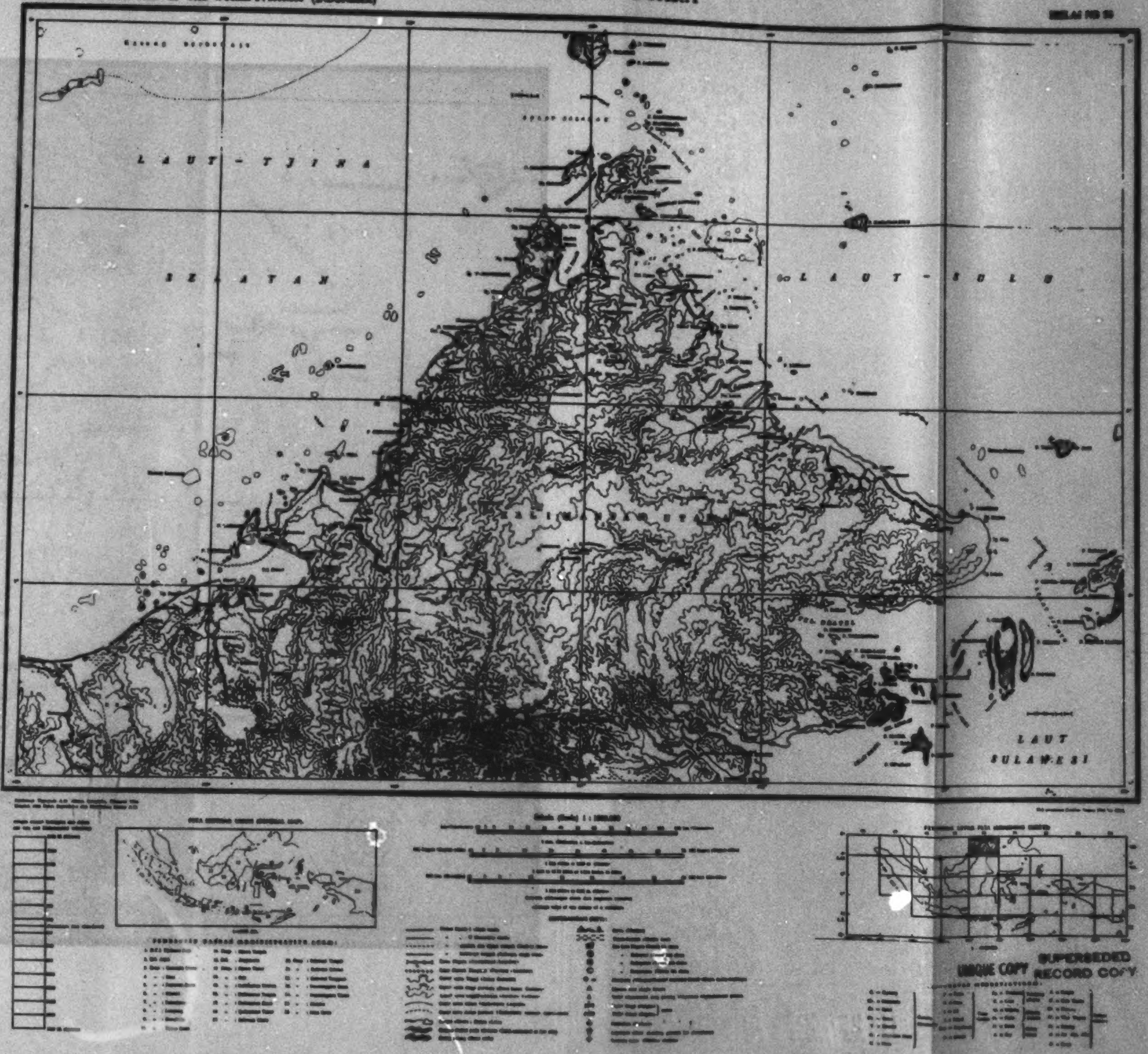


UNIQUE COPY

SUPERSEDED RECORD COPY

PETA INTERNASIONAL DUNIA 1:1000.000
INTERNATIONAL MAP OF THE WORLD 1:1000.000 (INDONESIA)

KALIMANTAN UTARA


LAUT-TJINA SELATAN
LAUT-SULU
KALIMANTAN UTARA
LAUT SULAWESI

UNIQUE COPY
SUPERSEDED RECORD COPY

MAP 9 (Enlargement)

MAP 9 (Enlargement)

MAP 10

Sheet NB 50 "Bandar Seri Begawan" (1976)

PETA DUNIA INTERNASIONAL SKALA 1 : 1
INTERNATIONAL MAP OF WORLD SCALE 1 :

NB. 50

MAP 10

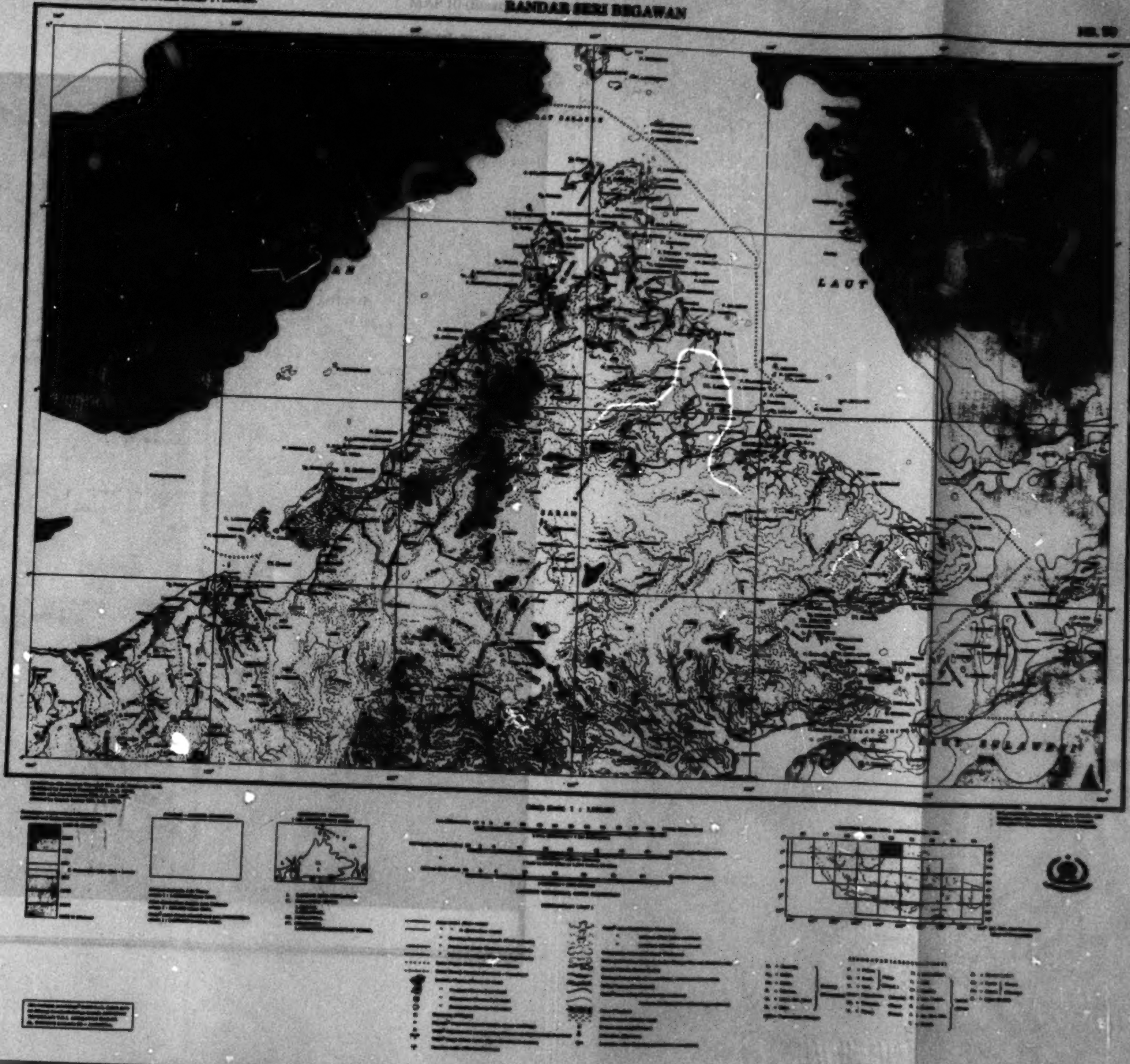
LAUT SULAWESI

PETA DUNIA INTERNASIONAL SKALA 1 : 1.000.000.
INTERNATIONAL MAP OF WORLD SCALE 1 : 1.000.000.

BANDAR SERI BEGAWAN

NB. 50

MAP 10



MAP 10 (Enlargement)

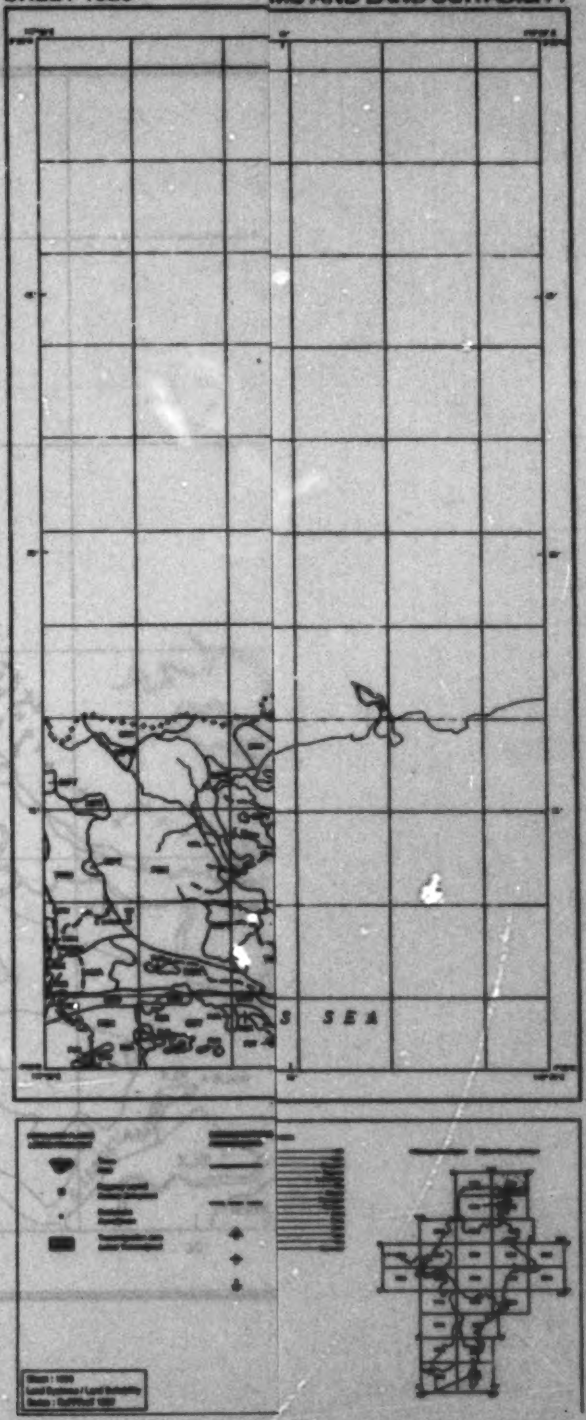
MAP 10 (Enlargement)

MAP 11

Sibatik Land Systems and Land Suitability (1987)

MAP 11

SHEET 1920 MS AND LAND SUITABILITY



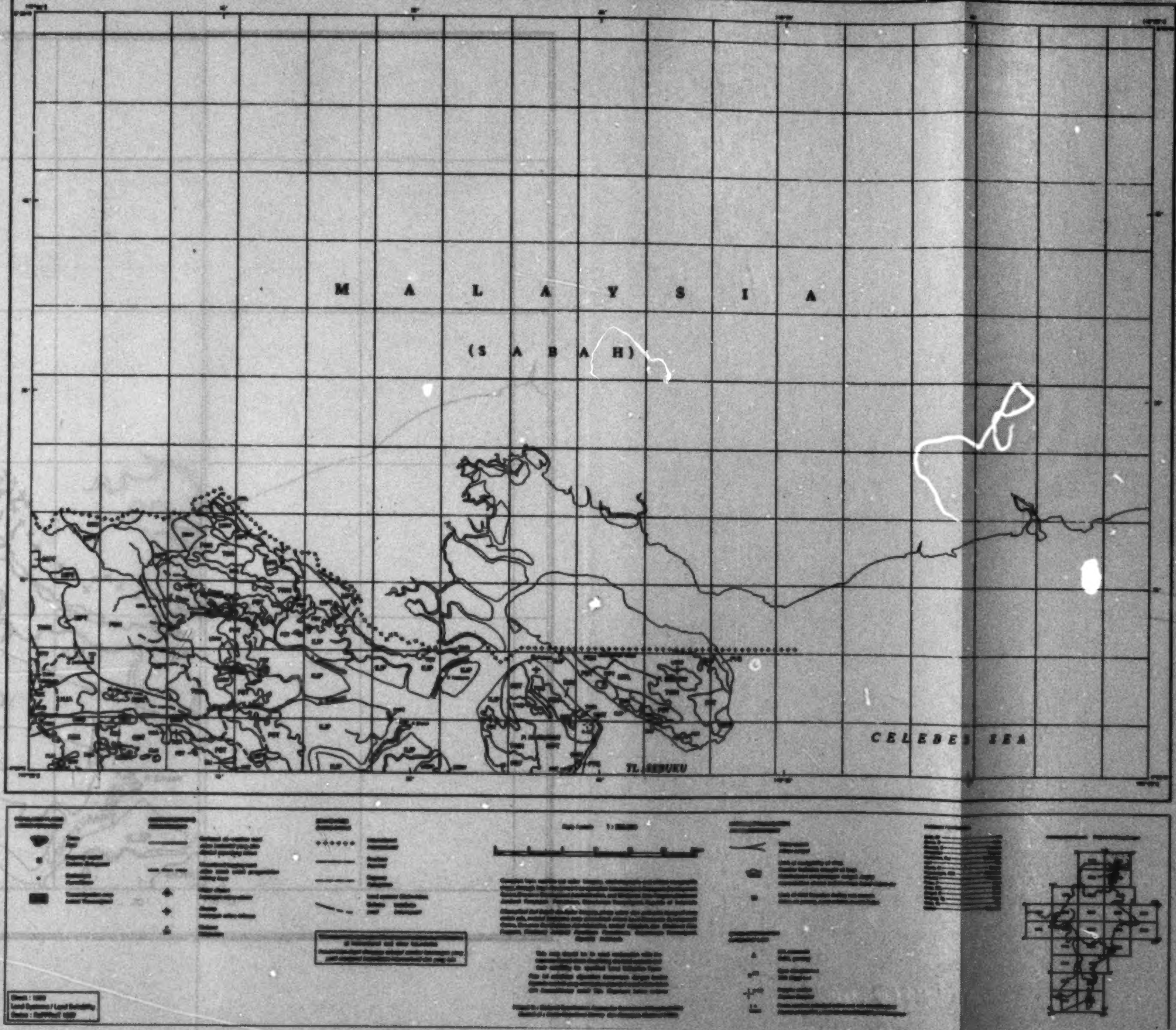
MAP 11

MAP 11 (Enlargement)

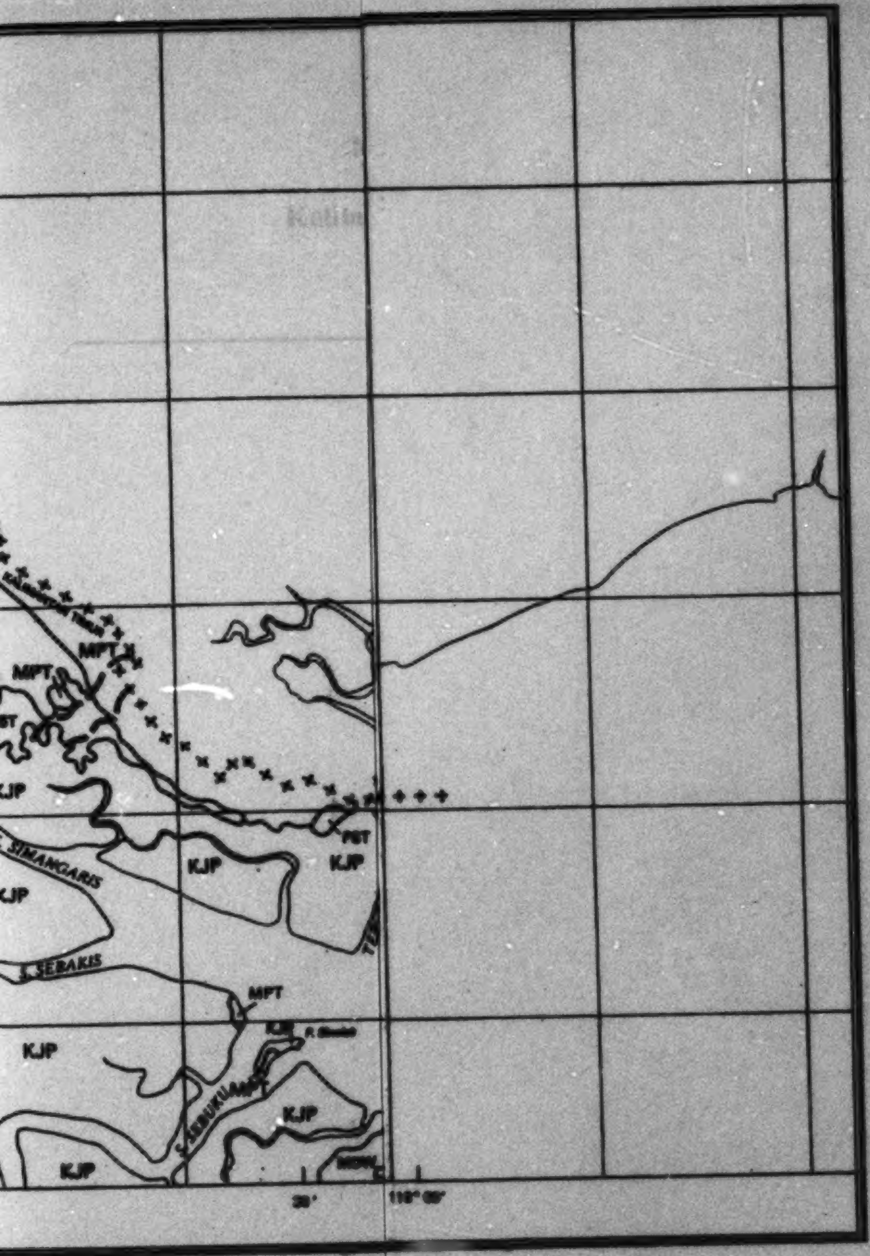
SHEET 1920

SIBATIK

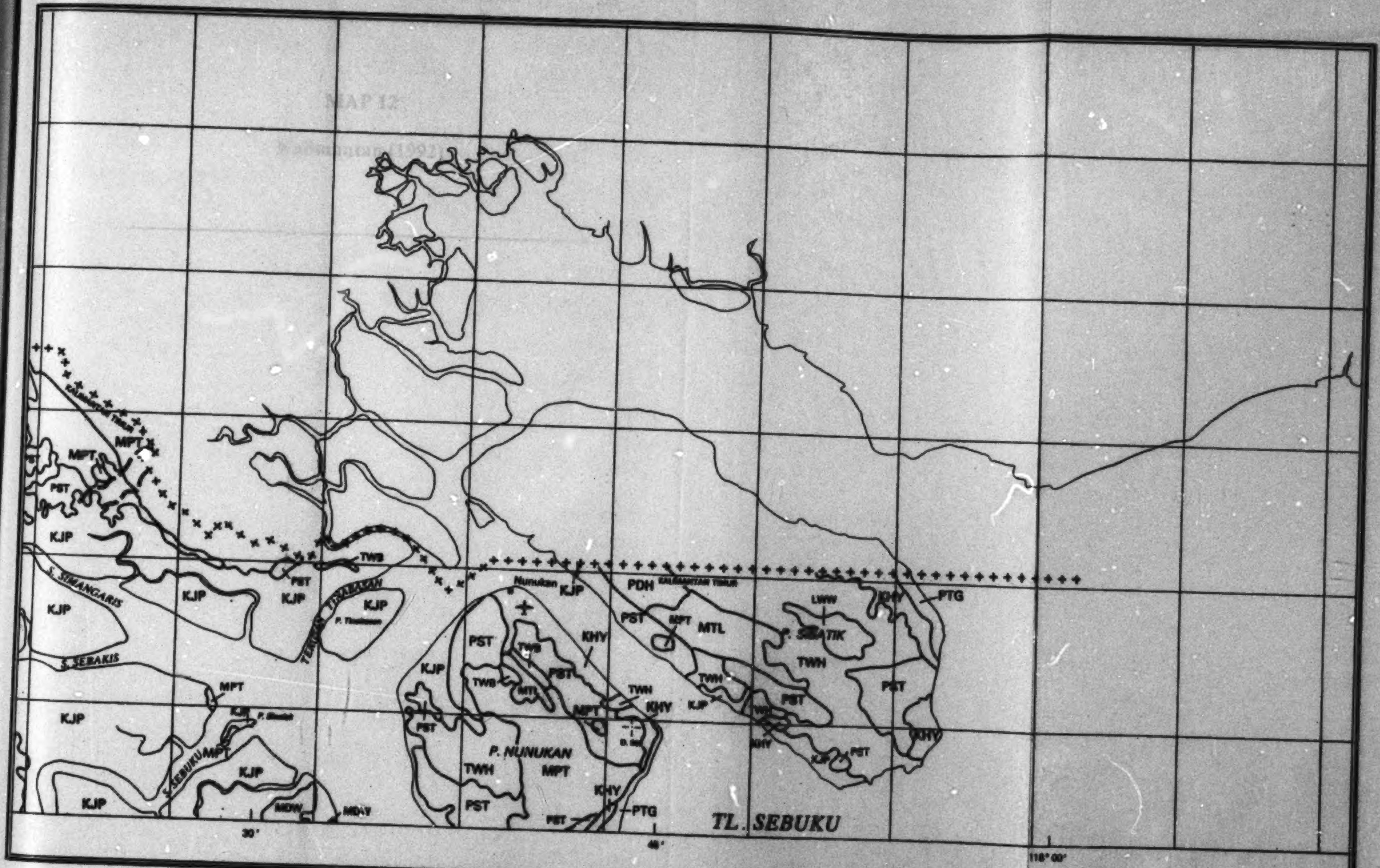
LAND SYSTEMS AND LAND SUITABILITY


M A L A Y S I A
(S A B A H)
CELEBES SEA
TL. SEBUKU

MAP 11 (Enlargement)


MPT
MPT
ST
KJP
S. SIMANGARIS
KJP
PST
KJP
KJP
S. SEBAKIS
MPT
KJP
KJP
S. SEBUKU
MPT
KJP
KJP
30'
118° 00'

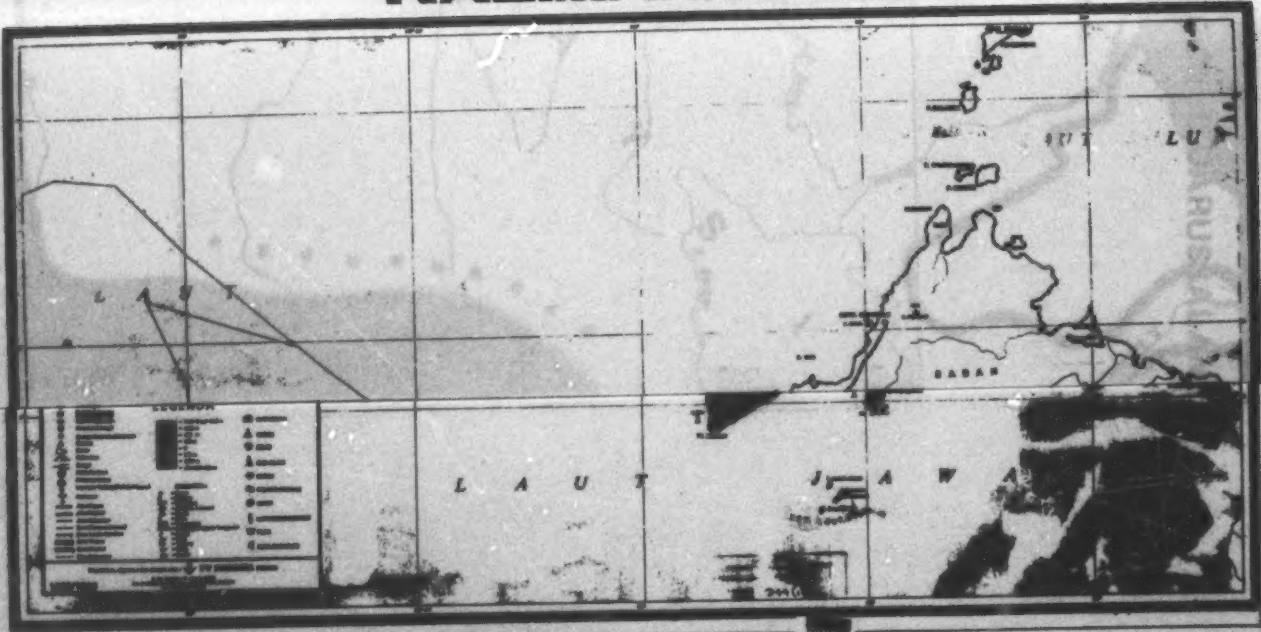
MAP 11 (Enlargement)


KALIMANTAN TIMUR
MPT
PST
KJP
S. SIMANGARIS
S. SEBAKIS
TWB
TERUSAN TINABASAN
P. Tinabasan
Nunukan
PDH
KALIMANTAN TIMUR
MTL
LWW
P. SEBATIK
TWH
KHY
PTG
P. NUNUKAN
MDW
S. SEBUKU
TL. SEBUKU
30'
40'
118° 00'

MAP 12

Kalimantan (1992)

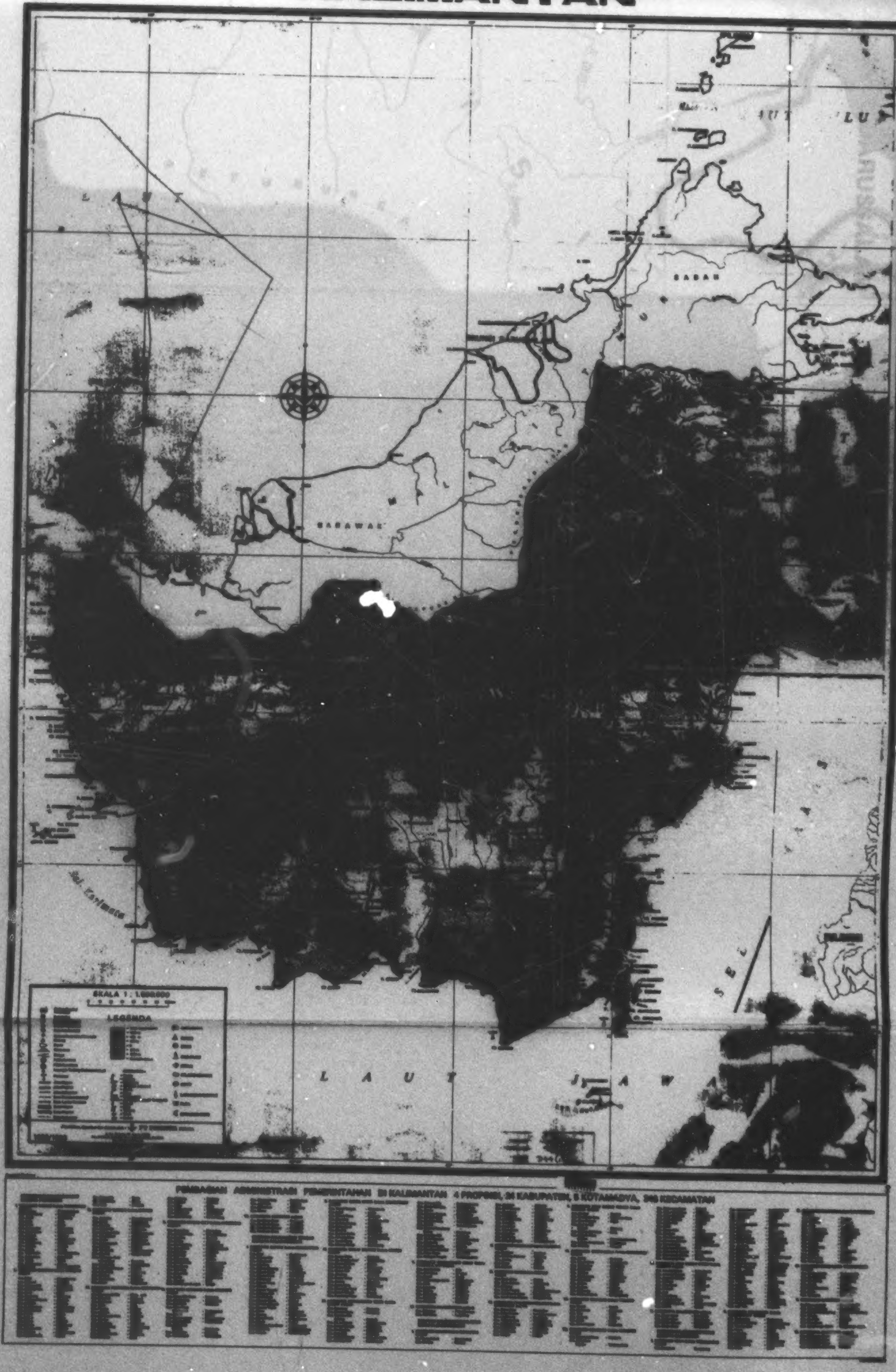
KALIMANTAN


LAUT
LAUT JAWA
SABAH

PEMBAGIAN ADMINISTRASI PEMERINTAHAN DI KALIMANTAN 4 PROPINSI, 24 KABUPATEN, 5 KOTAMADYA, 348 KECAMATAN

[illegible]

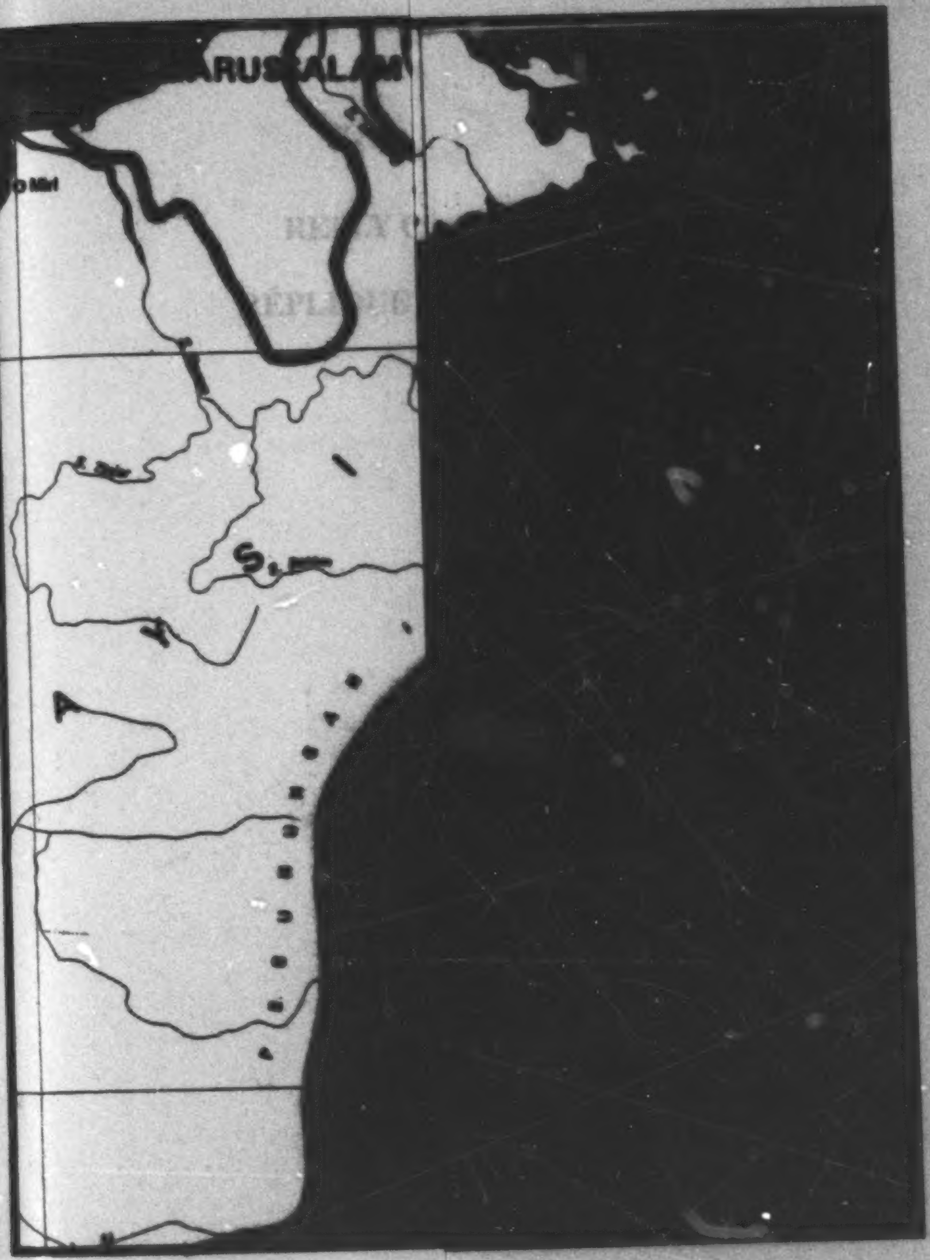
KALIMANTAN

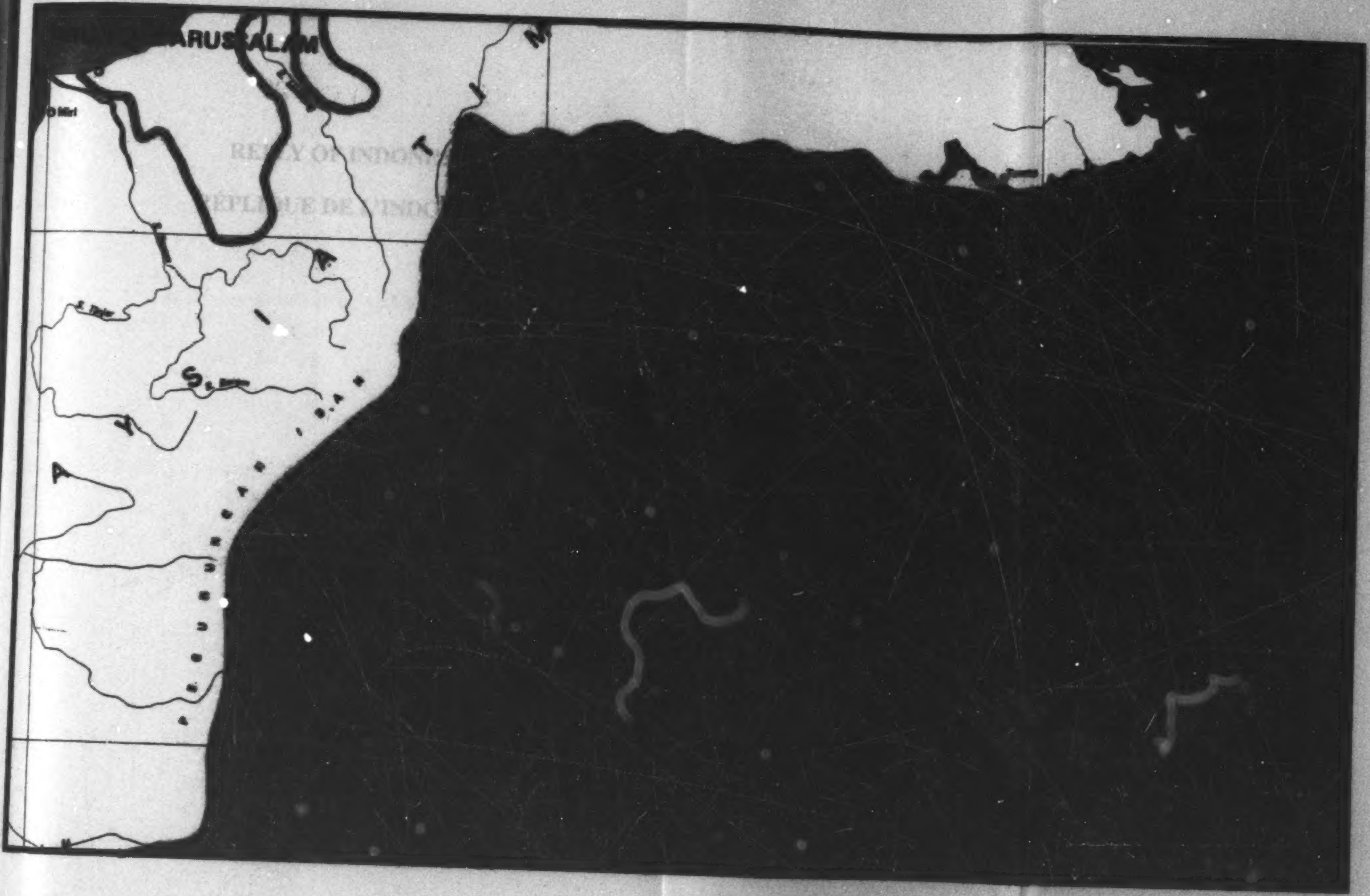

DARUSSALAM
SABAH
SARAWAK
LAUT
LAUT JAWA
SEL
Sel. Karimata
SKALA 1 : 1.000.000
LEGENDA

PEMBAGIAN ADMINISTRASI PEMERINTAHAN DI KALIMANTAN 4 PROPINSI, 24 KABUPATEN, 5 KOTAMADYA, 245 KECAMATAN

MAP 12

MAP 12 (Enlargement)


ARUSSALAM
To Miri
S
A


ARUSSALAM
Miri
S. Tinjar

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)

REPLY OF INDONESIA

REPLY

RÉPLIQUE DE L'INDONÉSIE

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Volume 1

2 MARCH 2001

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)

REPLY

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Volume 1

2 MARCH 2001

INTRODUCTION

1. Indonesia's Reply is submitted pursuant to the Court's Order of 19 October 2000 fixing 2 March 2001 as the time-limit for the submission of the Parties' Replies in the case. In accordance with Article 49(3) of the Rules of Court, Indonesia will not in this Reply attempt to recanvass all of the issues in the case. Indonesia will instead concentrate on the principal issues which, at this stage of the proceedings, continue to divide the Parties.

2. Indonesia's position on the issue of sovereignty is straightforward. Indonesia considers that it possesses sovereignty over both islands on the basis of a clear treaty title agreed by the Parties' colonial predecessors, The Netherlands and Great Britain, in the 1891 Anglo-Dutch Convention.

3. Prior to the 1891 Convention, the limits of the respective territorial possessions of The Netherlands and Great Britain (the latter on behalf of North Borneo) in the area were uncertain. Both had acquired their possessions on the basis of grants from the local rulers - the Sultan of Boeloengan in the case of The Netherlands and the Sultans of Brunei and Sulu in the case of Great Britain. However, the precise extent of these rulers' domains were uncertain.

4. The 1891 Convention was inspired by the common desire of The Netherlands and Great Britain to resolve this uncertainty once and for all so as to avoid further controversy. The intention to conclude a convention settling territorial questions both on the Borneo mainland and with respect to offshore islands was made clear during the negotiations leading up to the signature of the Convention and in the proposals which were exchanged between the parties.

5. Contrary to what Malaysia says in its Counter-Memorial, Indonesia does not say that there was a specific dispute concerning the islands between The Netherlands and Britain before 1891[1]. Nor does Indonesia maintain that this dispute was resolved in favour of The

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[1] MCM, para. 1.5 (b).

Netherlands by virtue of the 1891 Convention[2]. Indonesia's position, which is supported by the terms and context of the Convention itself, the *travaux préparatoires*, the Explanatory Memorandum Map presented to the Dutch Parliament in the course of the Convention's ratification – a map which was known to and acquiesced in by the higher levels of the British Government – and the subsequent conduct of the Parties, is that the 1891 Convention represented a compromise solution between the positions of the Dutch and British both on the mainland and with respect to insular possessions. Certain islands, Sipadan and Ligitan included, were determined to be Dutch by virtue of their location to the south of the 4° 10' N parallel of latitude; others islands lying north of the 4° 10' N line were deemed to be British. As such, the 1891 Convention "favoured" neither one party nor the other.

6. There is a wide array of evidence drawn from the post-1891 Convention period which confirms Indonesia's position. Malaysia has systematically neglected or attempted to downplay the significance of this evidence, but the evidence is of considerable, if not dispositive, value in the case. In addition to the important Explanatory Memorandum Map, it includes a consistent pattern of conduct on the part of the Parties and their colonial predecessors respecting the 4° 10' N line in practice as separating their possessions in the relevant area. In particular, the visit in 1921 of the Dutch warship, the *Lynx*, to Sipadan and Ligitan constituted a clear expression of Dutch sovereignty over the islands. In addition, the conduct of the Parties in granting petroleum licences seaward of the Island of Sebatik, their mutual respect for the 4° 10' N line in erecting navigational aids, and numerous maps prepared by the highly respected cartographic institute, Stanford, on behalf of the BNBC as well as by official Malaysian mapping agencies all attest to their respect for the line established by the 1891 Convention.

7. In its Counter-Memorial, Malaysia has suggested that Indonesia somehow bears an enhanced burden of proof in the case[3]. There is no justification for such a plea which is in reality no more than a self-serving argument introduced for purposes of colouring the issues in the case. Indeed, it could be argued with greater conviction that it is Malaysia which bears the burden of proving that the legal title acquired by Indonesia under the 1891 Convention was

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[2] *Ibid.*, para. 1.5 (c).

[3] *Ibid.*, para. 1.8.

subsequently displaced by Great Britain or Malaysia. But this is mere question begging. In the final analysis it is both Parties which bear the burden of demonstrating that they have the better title to the islands in question. Indonesia is confident that it has more than satisfied this burden while Malaysia has not.

8. The issues that divide the Parties on these points are taken up in Part 1 of this Reply. Chapter I addresses the relevant background to the Convention and its object and purpose. Chapter II then turns to the interpretation of the Convention in the light of its terms and the subsequent practice of The Netherlands and Great Britain, including the Explanatory Memorandum Map and the 1915 and 1928 Agreements. Chapter III ends this part with a discussion of the numerous elements which confirm Indonesia's interpretation of the Convention and Indonesia's title to the islands.

9. In contrast, Malaysia's arguments on the issue of sovereignty are confused and inconsistent. In its Memorial, Malaysia argued that its title was based on three separate, but mutually inconsistent, chains of title. First, Malaysia alleged that Great Britain, or more properly the BNBC, acquired title to the islands pursuant to the 1878 grants from the Sultans of Brunei and Sulu to Messrs. Dent and Overbeck and the 1903 Confirmation of Cession signed unilaterally by the Sultan of Sulu. Second, Malaysia argued that title to the islands as of 1878 did not vest in the BNBC, but rather in Spain which had succeeded to the rights of the Sultan of Sulu in the Sulu Archipelago. That title is said to have been subsequently transferred to the United States in 1900 and then ceded to Great Britain in the 1930 Anglo-U.S. Convention. Third, Malaysia asserted that whatever the status of the legal title, Great Britain administered the islands from 1878 onwards.

10. Clearly, there are serious difficulties in reconciling these positions. How, for example, could legal title vest simultaneously in Great Britain and Spain or, after 1900, in Great Britain and the United States? This perhaps explains why Malaysia has re-oriented its position in its Counter-Memorial. No longer does Malaysia assert that Great Britain (on behalf of the BNBC) acquired a legal title to the islands between 1878 and 1930. Instead, title is alleged to have vested in Spain up to 1900 and in the United States up to 1930. At the same time, Malaysia continues to maintain that Great Britain administered Sipadan and Ligitan despite the existence of a so-called legal title lying elsewhere.

11. In Part 2 of this Reply, Indonesia will focus on the fundamental defects which undermine Malaysia's theory of the case. In Chapter IV, Malaysia's re-orientation of its case away from the argument that Great Britain acquired a legal title to the islands in 1878 will be addressed. Chapter V then summarises the problems which Malaysia faces in trying to demonstrate that the Sultan of Sulu, from whom Malaysia's title allegedly derives, possessed an original title to the islands. Quite simply, there is no evidence of a Sulu title to the islands based on the historic record.

12. In Chapter VI, Indonesia will turn to the newly-formed core of Malaysia's case – that sovereignty over the two islands was passed to Spain in the mid-19th century, thence to the United States under the 1900 Treaty between the United States and Spain, and thence to Great Britain under the 1930 Anglo-U.S. Convention. As Indonesia will show, at each stage of this purported chain of title Malaysia's arguments break down on the facts. Malaysia has not and cannot show that Spain ever considered that it had title to Sipadan or Ligitan. As for the assertion of a U.S. title from 1900 to 1930, Malaysia has simply neglected to address the evidence that exists proving that the United States never advanced a claim to the islands and that it expressly withdrew the 1903 map on which Malaysia's case so heavily depends. Indonesia will address this crucial evidence in Chapter VI. And with respect to the 1930 Convention, Indonesia will also show that this instrument cannot in any way be considered to have resulted in a cession of the islands to Great Britain.

13. Finally, in Chapter VII, Indonesia will return to the flaws inherent in Malaysia's argument that, whatever the status of title to the islands, Great Britain administered the islands from 1878 onwards. It will there be shown that there is no evidence of such administration during the 40 year period from 1878 to 1917, and that even in 1917, when Great Britain issued a turtle egg ordinance with respect to Sipadan, this not only could not have displaced the legal title which The Netherlands had acquired over the islands under the 1891 Convention, but also any such activities are outweighed by the physical manifestation of Dutch sovereignty evidenced by the 1921 visit of the *Lynx* to the islands.

14. This Reply comprises two volumes. Volume 1 constitutes the Reply proper while Volume 2 includes further documentary evidence adduced by Indonesia in support of the arguments it makes in this Reply.

PART I

INDONESIA'S TITLE TO SIPADAN AND LIGITAN

CHAPTER I

THE OBJECT AND PURPOSE OF THE 1891 CONVENTION

Section 1. Introduction

1.1 It is Indonesia's contention that the 1891 Convention had the result that Sipadan and Ligitan were acknowledged by Great Britain as belonging to The Netherlands. In developing this argument in its Memorial (principally in Chapter V) and Counter Memorial (principally in Chapter V) Indonesia set out its argument on the significance of the Anglo-Dutch Convention of 20 June 1891. At paragraphs 5.65-5.70 of its Memorial Indonesia summarised this part of its case as follows:

(a) Whatever doubts there might have been up to the late 1880s as to the course of the dividing line between Dutch and British possessions in north-eastern Borneo, with the conclusion and ratification of the Convention of 20 June 1891 between Great Britain and The Netherlands any such doubts were finally set aside.

(b) The Convention, by its terms, its context, and its object and purpose, established the 4° 10' N parallel of latitude as the dividing line between the parties' respective possessions in the area now in question. The islands presently in dispute - Ligitan and Sipadan - lie to the south of that parallel. It therefore follows that under the Convention title to those islands vested in The Netherlands and now vests in Indonesia.

(c) By its conduct at the time, and in particular by virtue of the Explanatory Memorandum Map and its contemporaneous variation of the Contract with the Sultan of Boeloengan, the Dutch Government demonstrated its understanding of the meaning to be attributed to Article IV of the 1891 Convention. It did so by means which were not only public knowledge at the time, but also by means of which the British Government were officially informed. Great Britain's failure to protest, or in any other way to dissent from the Dutch Government's views of which it had such public and official knowledge, showed that it accepted those views as the correct interpretation of the 1891 Convention.

(d) As envisaged in Article V of the 1891 Convention, further elaboration of parts of the 1891 boundary line was contained in later agreements concluded in 1915 and 1928; but since the 1891 line had been determined by a parallel of latitude its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation.

1.2 In its Counter-Memorial Malaysia argues against the position adopted by Indonesia, in the following contexts:

(1) the background to the Convention[1];
(2) the negotiations for the Convention[2];
(3) the naval survey of May-June 1891[3];
(4) the interpretation of the Convention[4];
(5) the ratification of the Convention, and the Explanatory Memorandum Map[5];
(6) the 1915 Agreement[6].

1.3 In this Chapter Indonesia will consider the first three of these contexts; the last three will be considered in Chapter II.

---

[1] MCM, paras. 2.4-2.20.
[2] *Ibid.*, paras. 2.21-2.28.
[3] *Ibid.*, paras. 2.29-2.42.
[4] *Ibid.*, paras. 2.43-2.48.
[5] *Ibid.*, paras. 2.49-2.59.
[6] *Ibid.*, paras. 2.67-2.78.

Section 2. The Background to the 1891 Convention

1.4 Indonesia has demonstrated in its Memorial (at Chapters IV and V), that:

(a) before 1891 there were various uncertainties as to the exact location of the boundary between Dutch and British possessions in North Borneo (which means that the extent and validity of claims and title to territory in the area were uncertain), but

(b) those uncertainties were brought to an end by the conclusion of the 1891 Convention.

1.5 In other words, the existence of valid claims (whether by The Netherlands through the Sultan of Boeloengan, or by the British through the Sultan of Sulu) was in principle an irrelevance. Nevertheless Malaysia devotes much effort to seeking to establish that before 1891 the Sultan of Sulu had title to Sipadan and Ligitan, and that any claims which the Sultan of Boeloengan had to those islands could not be sustained.

1.6 However, Malaysia's apparent belief that Indonesia's case depends in part upon the validity of the Sultan of Boeloengan's claims to the two islands is not true either as a matter of abstract law or as a statement of Indonesia's position. Malaysia has misunderstood the thrust of Indonesia's argument, and Malaysia's concentration on the extent of pre-1891 local titles is misplaced.

1.7 Moreover, Malaysia has wrongly summarised Indonesia's argument as being that "[t]here was a dispute concerning the islands between The Netherlands and Britain [...] before 1891" and that "[t]he dispute was resolved in favour of The Netherlands by the 1891 Boundary Convention"[7]. But Indonesia has not suggested that there was any specific Anglo-Dutch dispute about the islands, and neither Indonesia nor Malaysia has adduced any evidence that Sipadan and Ligitan were specifically mentioned by either side during the negotiations for the 1891 Convention[8]. There was, rather, a general uncertainty about territorial possessions in the area, involving both mainland possessions and many insular possessions (including but by no means limited to Sipadan and Ligitan), and it was that general uncertainty which was resolved by the 1891 Convention – a resolution which was in Great Britain's favour in respect of territories to the north of the agreed terrestrial boundary line and all islands to the north of the 4°10' N line, and in The Netherlands' favour in respect of all territories and islands (including Sipadan and Ligitan) to the south of those lines.

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[7] *Ibid.*, para. 1.5(b) and (c).

1.8 Although Indonesia's title to Sipadan and Ligitan does not depend on the Sultan of Boeloengan having title to them, Malaysia for its part acknowledges that its case entirely depends on the alleged rights of the Sultan of Sulu over the disputed islands, which would have been ceded to Spain, then by Spain to the United States and, eventually by the United States to Britain to which Malaysia is the territorial successor. This "chain of title" is described by Malaysia in the following terms:

> "Malaysia's claim is *based on* the acquisition by Spain *of the possessions of the Sultan of Sulu*. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930"[9].

1.9 Consequently, if Sulu had no title over Ligitan and Sipadan, neither Spain, the United States, Great Britain nor Malaysia itself could have inherited any such rights over the islands. As Malaysia puts it:

> "Evidently if [Sulu then] Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900"[10].

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[8] ICM, paras. 5.67, 5.68(b) and 5.88.
[9] MCM, para. 2.2. Emphasis added.
[10] *Ibid.*, para. 3.17.

1.10 As Indonesia will show in Chapter V of this Reply, Sulu had no right to the islands in dispute; they were outside the reach of its effective as well as its "theoretical" sovereignty and Malaysia has not shown *any* trace of administration or presence of Sulu in respect of either Ligitan or Sipadan.

1.11 But there is something more. Even if Malaysia could establish that the islands had belonged to the Sultan of Sulu before 1891, *quod non*, as to which, see Chapter V below, this would be irrelevant: whatever the previous state of affairs, the 1891 Convention would have created a new situation, in accordance with the international law prevailing at the time in matters concerning colonial acquisitions.

1.12 For this same fundamental reason, there is no ground for the assertion repeated by Malaysia according to which:

> "Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Bulungan, a valid claim to the islands before 1891, *and* (b) that the Netherlands retained sovereignty over them under the 1891 Boundary Convention"[11].

Alternatively put:

> "Indonesia's arguments […] depend in the final analysis upon the proposition that the territory of Bulungan in 1890 extended to the islands off the coast of the Sempoma peninsula, including Sipadan and Ligitan […] If the Netherlands did not already hold the islands in 1890, the 1891 Boundary Convention must be irrelevant"[12].

1.13 These allegations are fundamentally flawed since they rest on a serious misinterpretation of the 1891 Convention. Its aim and purpose *was not to cede* territories that both Parties could have claimed for negotiation purposes (while acknowledging that ownership or sovereignty over them was uncertain – as to which, see Chapter VI, Section 3, below), neither was it *to recognise mutually* the pre-existing territorial situation: the 1891 Convention was a sharing of non-European territories between two powers which barely cared about the pre-colonial situation (even though they used treaties or contracts concluded with local rulers as the basis for arguments in their negotiations), which was conducted in such a way as to put an end to their territorial disputes in the region.

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[11] *Ibid.*, para. 3.17. Emphasis added.

[12] *Ibid.*, para. 3.29.

1.14 It is apparent from several cases decided by this Court and international arbitral tribunals that the pre-colonial situation has no bearing on the colonial and post-colonial legal status of a territory or its border. Thus, in the case concerning the *Frontier Dispute* the Chamber of the Court recognised that, at first sight, the principle of *uti possidetis*, which consolidated the colonial situation to the detriment of the unity of peoples, "conflicts outright with another one, the right of peoples to self-determination", but it acknowledged that, for good reason, "the principle of *uti possidetis* has kept its place among the most important legal principles"[13]. As this same Chamber said, "the principle applies to the [new] State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock but does not put back the hands"[14]. This holds true for the colonial period and, *a fortiori*, for the pre-colonial period.

1.15 Again, in the case concerning the *Territorial Dispute*, the Court decided that its conclusion "that the Treaty [of 1955 between France and Libya] contains an agreed boundary renders it unnecessary to consider the history of the 'Borderlands' claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy"[15]. The Court added:

> "Likewise, the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case"[16].

1.16 At a more general level, in its Award of 9 October 1998, the Arbitral Tribunal in the dispute between Eritrea and Yemen rejected the doctrine of "reversion" and stated that:

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[13] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, ICJ Reports 1986*, p. 554, at p. 567, paras. 25-26.
[14] *Ibid.*, at p. 568, para. 30. Emphasis in the original.
[15] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994*, p. 6 at p. 38, para. 75.
[16] *Ibid.*, p. 38, para. 76.

> "Whatever may have been the links between the coastal lands and the islands in question [before 1923], the relinquishment by the Ottoman Empire of its sovereignty over the islands by virtue of Article 16 of the 1923 Treaty of Lausanne [...] logically and legally affects any pre-existing title"[17].

1.17 Consequently, Malaysia's efforts in seeking to establish that the Sultan of Boeloengan had no claims to Ligitan and Sipadan, or that any such claims as he might have had cannot be sustained, are misplaced. There can be no doubt that before 1891 there was great uncertainty as to the exact location of the boundary between local sultanates in northern Borneo (and, by way of consequence, between the Dutch and British possessions, since, at the time, both parties relied upon their arrangements with local rulers), which means that both the extent and validity of claims and titles to territory in the area were uncertain. However, it was precisely this uncertainty which was brought to an end by the conclusion of the 1891 Convention. This is precisely what Indonesia wrote in its Memorial (at paragraph 5.1), as correctly quoted by Malaysia in its Counter-Memorial (at paragraph 2.1), which then goes on to misinterpret and distort Indonesia's argument. The conclusion that the 1891 Convention put an end to all territorial disputes in the region "renders it unnecessary to consider the [pre-colonial history] on the basis of title inherited from the indigenous people"[18].

1.18 In other words, the existence of valid claims (whether by The Netherlands through the Sultan of Boeloengan, or by the British through the Sultan of Sulu) is in the event an irrelevance: claims overlapped; the validity of titles was arguable; the significance of acts on the ground was debatable; there were, in short, uncertainties, to which Indonesia will revert in Chapter V, and these uncertainties concerned both the land territory and, probably to a greater extent, the surrounding islands. These uncertainties were the very reason for the conclusion of a Convention in 1891, *and they were set at rest by that Convention*, even if it was under a different form as regards the mainland (and Sebatik) on the one hand, and the islands on the other. In the first case (land delimitation) the Convention resulted in a boundary line, in the second (attribution of islands) it resulted in an allocation of territories on either side of the line.

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[17] *Yemen/Eritrea, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, para. 124.

[18] See the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *op. cit.*, at p. 38, para. 75.

1.19 There is nothing strange or unusual in a single instrument operating both ways. As the Chamber of the Court noted in the case concerning the *Frontier Dispute* between Burkina Faso and Mali:

> "It is not without interest that certain recent codifying conventions have used formulae such as a treaty which 'establishes a boundary' or a 'boundary established by a treaty' to cover both delimitation treaties and treaties ceding or attributing territory (cf. Vienna Convention on the Law of Treaties, Art. 62; Vienna Convention on Succession of States in respect of Treaties, Art. 11). In both cases, a clarification is made of a given situation with declaratory effect from the date of the legal title [...]"[19].

1.20 Moreover, in the present case, the history of the negotiations shows that:

(a) both The Netherlands and Great Britain invoked pre-colonial titles allegedly ceded to them by local rulers;

(b) both acknowledged that those titles and their precise extent were uncertain;

(c) this did not however impede them in concluding a treaty, the aim of which was clearly to put a final end to their territorial disputes in the area.

1.21 Malaysia has made much of the arrangements made in the years before 1891 by the Dutch regarding the territorial extent of Dutch influence in this part of Borneo. These have to be seen in their context. Thus statements (e.g., in the 1846 Resolution of the Governor-General) renouncing influence over areas north of the River Atas and all islands of the northern coasts of Borneo were made at a time of steady European expansion in the region; even if Sipadan and Ligitan are (despite the local geography) to be treated as being islands of the "northern coasts" of Borneo, limits of influence asserted in 1846 have little bearing on the extent of sovereignty or even influence half a century later, as demonstrated by successive later contracts with the Sultan of Boeloengan.

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[19] *Frontier Dispute (Burkina Faso/Republic of Mali), op. cit.*, at p. 563, para. 17.

1.22 Those later Contracts are more significant than Malaysia suggests; or rather the absence of any British protest against them is significant. Even if the 1850 Contract was not formally notified to the British Government, such formal notification is not the only basis for the making of a protest: a Government which has actually acquired knowledge of a matter calling for protest, or which as a reasonably prudent government ought to have known of it, is equally required to protest or have its failure to protest held against it. The later Contract of 1878 was, in fact, formally notified to the British Government on 17 January 1880[20], but there is no record of any British protest having been made against it.

1.23 In summary, for the purposes of these present proceedings, the pre-1891 situation is relevant only as background, showing the uncertainties to which overlapping claims gave rise. Even a soundly based and recognised title to territory on the 'wrong' side of the line agreed in the 1891 Convention would now be of no avail to the title-holder; while a soundly based and recognised title to territory on the 'right' side of that line would now be of historical interest only, confirmed as it would be by the terms of the Convention which constitute the present basis for title. The Convention disposed of the question of British and Dutch territorial possessions in North East Borneo once and for all, and after 1891 the question of territorial sovereignty was definitively and comprehensively determined by the terms of the Convention.

Section 3. Negotiations for the 1891 Convention

1.24 Indonesia has described the course of the negotiations leading to the 1891 Convention in its Memorial[21] and Counter-Memorial[22]. Without prejudice to the more detailed exposition given in those paragraphs, Indonesia there showed that, starting from the original uncertainty as to the extent of both parties' possessions in the area:

(a) the parties first accepted as the starting point for the line to separate their possessions the place at which the 4° 10' N parallel of latitude met the coast, i.e. at Broershoek;

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[20] IM, para. 4.63; MCM, para. 2.9.

[21] IM, paras. 5.24-5.33.

[22] ICM, paras. 5.59-5.76.

(b) thereafter their practical concerns focussed mainly on the land boundary inland into the mainland of Borneo, and the treatment to be accorded the island of Sebatik and navigation rights around it;

(c) their final agreement, motivated by a wish to put an end once and for all to their territorial problems in the area, was that, seawards from the coastal starting point at Broershoek, the line dividing their territorial possessions was the 4°10' N line "continued eastward along that parallel" – a line which, passing to the north of Sipadan and Ligitan, established that they belonged to The Netherlands (and now to Indonesia).

1.25 In paragraph 2.22 of its Counter-Memorial Malaysia quotes a comment by Sir Edward Hertslet, to the effect that "the only important point in dispute" was the question of navigation on the Sibuco and numerous other rivers which flow from the interior of Borneo into the sea in Sibuco Bay. It is difficult to see the significance of this observation in the present context.

(a) In the first place, it was written in a Memorandum dated 9 January 1989, i.e., six months *before* the first meeting of the Joint Commission which was held on 16 July that year and nearly 2½ years before the conclusion of the 1891 Convention[23]. It cannot therefore be a statement of what the negotiations - which had not then seriously begun - involved.

(b) Second, it is apparent that although Sir Edward Hertslet considered this issue as the only important point in dispute, what he was really doing was identifying the "only important point" of substance from the point of view of British negotiating aims: his comment followed and was consequential upon his calling attention, in the preceding paragraph, "to the great importance of not allowing the Dutch to enjoy the sole right of navigating the Sibuco and the numerous other rivers [...], as to admit such a claim might have the effect of depriving the Company of a large portion of their possessions [...]". Sir Edward Hertslet was not - and could not have been - describing what had in the event proved to have been the "only important point" in the negotiations themselves.

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[23] The memorandum is at MM, Vol. 3, Annex 43.

(c) Third, Sir Edward's January prognosis was proved wrong, in that the two major points actually to occasion considerable dispute in the negotiations were the starting point on the coast for the land boundary, and rights of navigation around the island of Sebetik.

(d) Fourth, whatever *British* aims might have been, *Dutch* aims need also to be taken into account; and the fact is that the parties did not directly and specifically address the aims of either party but rather set out, as the preamble to the Convention states, to establish a boundary between Dutch possessions and British North Borneo.

(e) Fifth, if Malaysia's purpose in quoting Sir Edward Hertslet's premature and erroneous observations was to suggest that the British side was not really interested in off-shore islands since he did not mention them as an "important point", it should equally follow that all the other matters *not* mentioned in Sir Edward's quoted observation were not important for the British Government; but this was manifestly not so. Moreover, whatever implications there may be for the British Government's attitude, there can be none whatsoever as to the attitude and interests of the other party to the negotiations, the Netherlands Government. Malaysia cannot use a British statement of the limited point of importance attached by Great Britain to the negotiations which were at the time yet to begin as if it were an objective statement of the "only important point" of dispute which arose during the negotiations.

1.26 Malaysia's reference to Dutch attitudes to the outcome of the negotiations is confused[24]. Malaysia disagrees with Indonesia's assertion that the Dutch were on the retreat, yielding territory to which they had strong claims, at least as regards the area between Broershoek and Batoe Tinagat. Malaysia has taken Indonesia's assertion out of its context. It was made in the opening paragraph of that part of Indonesia's Memorial which dealt with the negotiations for the 1891 Convention. There, Indonesia was making the *background* point that throughout the second half of the 19th century the history of north-eastern Borneo was characterised by British territorial expansion at the expense of the Dutch. It was in this sense that Indonesia observed that in effect the Dutch were on the retreat, even yielding territory to which they had strong claims, and that the eventual 1891 Convention had to be seen against that general background.

1.27 Indonesia stands by its brief, general characterisation of the history of the late 19th century in the north-eastern Borneo area: and indeed, Malaysia does not deny Indonesia's general proposition.

1.28 What Malaysia does seek to deny is the particular application of the general proposition to the area between Batoe Tinagat and Broershoek – an application, it is to be noted, which Indonesia did not itself make. Although Malaysia is not specific about the nature of its denial, it appears to be possibly two-fold: first, that The Netherlands was not on the retreat in the area between Batoe Tinagat and Broershoek, and second, that The Netherlands did not have strong claims to that area. On both counts Malaysia is wrong.

(a) As to the first, it is demonstrably the case that in falling back from a claimed position on the coast at Batoe Tinagat (and farther north inland) to the eventually agreed position on the coast where it is crossed by the 4°10' N parallel of latitude, The Netherlands was 'retreating'.

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[24] In MCM, para. 2.23.

(b) As to the second, it is equally undeniable that the Dutch had claims to the area up to at least Batoe Tinagat on the coast (and considerably further north inland), and considered them to be strong[25] - certainly strong enough to be put to the British as a clear claim line on an official map. Nothing said in the Dutch Explanatory Memorandum or in Parliament contradicts that state of affairs.

1.29 Malaysia relies on three passages: none of them serves to contradict the existence of strong Dutch claims in the region in question.

(a) The first passage, from the Explanatory Memorandum, says that the Dutch were seeking a settlement which would provide a correctly described borderline: that is true (and shows that a principal Dutch aim in the negotiations did indeed differ from that set out by Sir Edward Hertslet for the British - see paragraph 1.25, above), but has nothing at all to do with the strength or otherwise of Dutch claims to the area between Batoe Tinagat and Broershoek (but, incidentally, Indonesia notes with satisfaction that Malaysia has drawn attention to the important statement in the Explanatory Memorandum that the Dutch aim was to settle a borderline which "puts an end to all difficulties in the future": as to the significance of this statement, see paragraphs 5.56, 5.58 to 5.60 of Indonesia's Memorial, and paragraphs 5.30(e), 5.39, 5.69 and 5.88(c) of its Counter-Memorial, and below, paragraph 2.10).

(b) The second passage was from words spoken by the Dutch Minister of Foreign Affairs, that the Dutch were not "giving up territory that undoubtedly belongs to us". The Minister was here reassuring Parliament that *undoubtedly* Dutch territory still belonged to The Netherlands; i.e., what was being given up was only territory to which the Dutch had claims, and claims which the Dutch acknowledged were arguable. It is thus incorrect for Malaysia to say, in its summary at paragraph 2.28(b), that "the Netherlands Government strongly denied that it was yielding any territory": it was acknowledged that some *claimed* territory was being given up, and it was only "undoubtedly" Dutch territory which had not been yielded.

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[25] See IM, para. 5.9.

(c) The third passage, from the Explanatory Memorandum, was that the agreed boundary was more favourable for the Dutch than the British desired. This neither denies that the Dutch were, in general or even in the specific Batoe Tinagat-Broershoek area, on the retreat, nor does it say anything about the strength of Dutch claims in that area: all it indicates is that the British wanted to push the Dutch even further south, but that the Dutch negotiators had been able to resist them.

1.30 At paragraph 2.24 of its Counter-Memorial, Malaysia dissents from Indonesia's view that the Joint Commission's proposal for the boundary to pass between the islands of Sebatik and East Nanoekan "clearly envisaged [the boundary] in principle as one which, starting on the coast, ran eastwards *at sea* for an indeterminate distance, [...] i.e. out to the open sea"[26]. Malaysia states that the proposal was British, made by Sir Philip Currie: but that in itself is no reason why the effect of the proposal was not as Indonesia has described it. Malaysia, however, adds that had it been the intention of the British Government that the boundary should continue out to the open sea, "Britain would have singled out the issue when Count de Bylandt finally rejected the proposal". Malaysia gives no grounds at all for such an assertion, which in any event is (a) a *non sequitur*, and (b) pure speculation. In fact, the consistent view of the negotiators that the eventual line would continue out to sea has been clearly shown by the further material in Indonesia's Counter-Memorial, at paragraphs 5.70 to 5.75. Malaysia's summary of its position on this point, at paragraph 2.28(e) of its Counter-Memorial, that there was never any question of a line running eastwards out to the open sea, is thus incorrect.

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[26] At *ibid.*, para. 5.23.

1.31 Its incorrectness is further demonstrated by the internal minuting in the British Foreign Office in preparing the proposal eventually put forward in the negotiations for the 1891 Convention and referred to at paragraphs 5.73-5.74 of Indonesia's Counter-Memorial. This minute[27], clearly pursuing the British proposal that the matter be settled by a compromise and Dutch acceptance in principle of that idea[28], set out the prospective British compromise as follows:

> "Starting Eastward from a point A on the coast near Broers Hook on parallel 4° 10' of North Latitude, the line should follow that parallel until it is intersected by the Meridian of 117°39' East Longitude, opposite the Northernmost point of the Island of East Noenoekan, at the point marked B; it would then follow in a straight line midway between the Islands of Sebatik and East Noenoekan in a South Eastern direction to the point of the intersection of the 4th Parallel with the Meridian 117°50' East Longitude, opposite the Southernmost point of the Island of Sebatik at the point marked C. The line would continue thence in an Easterly direction along the 4th parallel, until it should meet the point of intersection of the meridian of 118°44'30" marked D"[29].

The British line is plotted on the sketch map overleaf as well as on Map 4 in Indonesia's Map Atlas, an historical map prepared by Stanford to illustrate the proposals being exchanged. It is readily apparent that points C and D are both off-shore, and that point D in particular extends well to the east of Sipadan. Although this particular proposal (which adopted 4° N as the latitudinal line to be followed) was not that which in the event was agreed, it shows compellingly that on the British side during the negotiations it was envisaged that the line dividing British and Dutch possessions should follow a line of latitude for a very considerable distance out to sea (see also below, paragraph 2.15). Moreover it shows that a British proposal which would have left Sipadan on the British side of the then-envisaged 4° N line was dropped in favour of the line eventually agreed at 4° 10' N, so leaving both islands now in dispute to The Netherlands.

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[27] See *ibid.*, Vol. 2, Annex 56, reflecting the language referred to in the next following footnote.

[28] See *ibid.*, paras. 5.19-5.20 and IM, Vol. 3, Annex 59.

[29] *Ibid.*, Vol. 2, Annex 56.

1.32 At paragraph 2.26 Malaysia makes much of the order in which the negotiations dealt with the three issues of the coastal starting point of the boundary, its westward extension and its eastward extension. That order of treatment was simply a matter of negotiating convenience, although fixing the coastal starting point at the outset had a certain logic to it. Apart from its negotiating convenience, the *order of* treatment has absolutely no implications for the *substance* of what was eventually agreed: whether the eastward continuation of the 4° 10' N line was dealt with before, or after, the westward continuation of the land boundary is wholly without significance for the question whether or not that line continued eastwards beyond the east coast of Sebatik. That point of substance can only be determined by the terms of the 1891 Convention.

1.33 At paragraph 2.27 Malaysia seeks support for its position in certain observations made in the Award in the *Guinea-Guinea Bissau* case. While Malaysia asserts some similarity between the circumstances there under consideration and those of the present case, in reality no such similarity exists.

(a) Malaysia refers to something which "the French Government had mentioned during the ratification debate" (i.e., the ratification debate of a French-Portuguese Convention concluded in 1886): but in fact, the words in question were not those of the Government nor were they made during the debate, but merely appeared in "an internal note of the French Ministry of Foreign Affairs dated 12 June 1887, concerning discussion of the ratification of the Convention by Parliament"[30].

(b) The arbitration concerned a different issue from that presently under discussion. Article I of the 1886 Convention[31] had provided that "the boundary separating the Portuguese possessions from the French possessions will follow"

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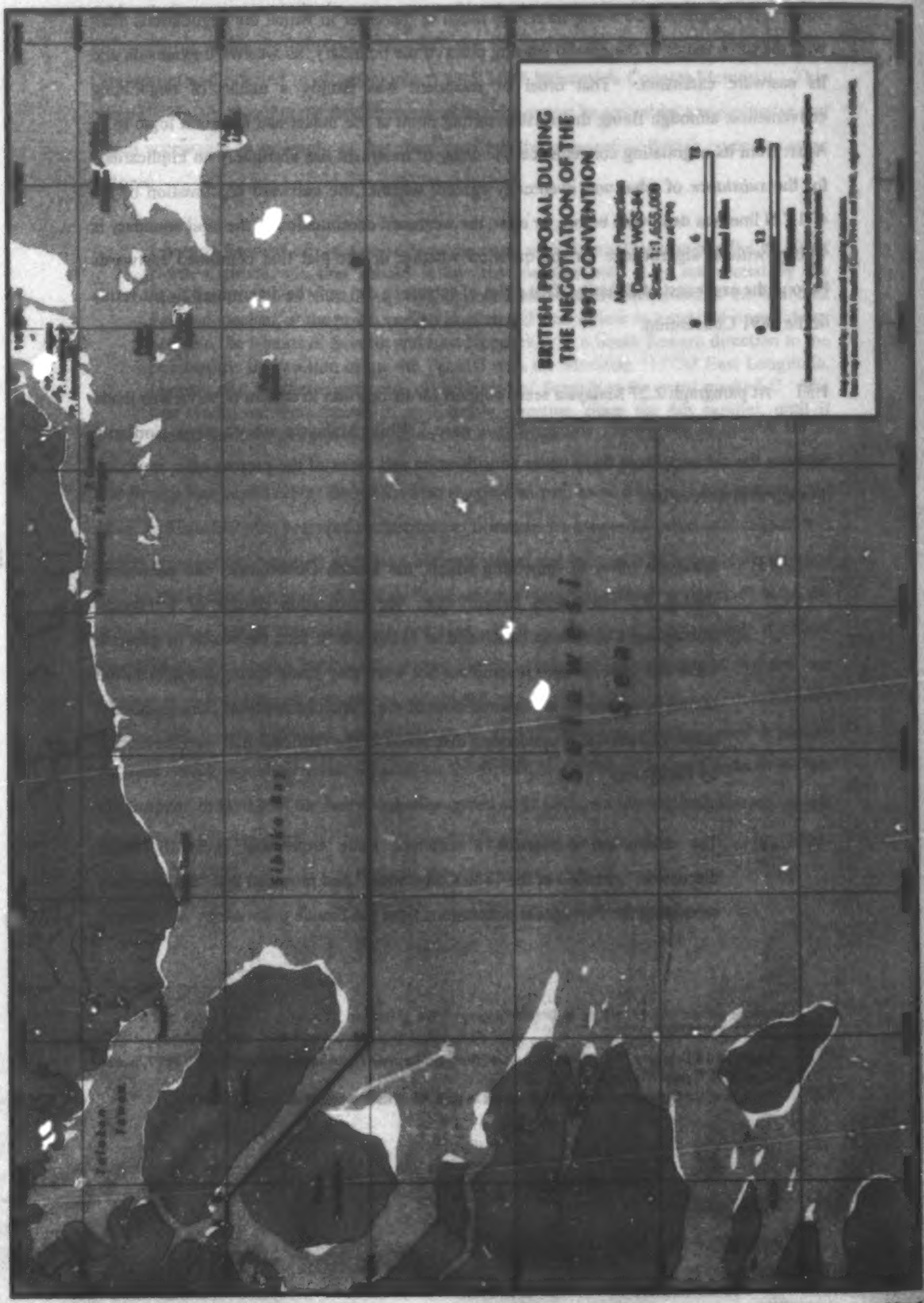
[30] Award of 14 February 1985, *Guinea-Guinea (Bissau) Maritime Delimitation Case* (1985), ILR 77, p. 636 at pp. 666-7, para. 61 (English text).

[31] The text of the Convention as ratified is set out in para. 45 of the Award, *ibid.*, at pp. 659-660.


BRITISH PROPOSAL DURING THE NEGOTIATION OF THE 1891 CONVENTION
Mercator Projection
Datum: WGS-84
Scale: 1:1,655,000
0
6
12
Nautical Miles
0
12
24
Kilometres
Sulawesi Sea
Sibuko Bay

Map 1

a course prescribed in detail in the Article; this course included a course at sea establishing what became known as the 'southern limit'. The question at issue was whether Article I established the maritime boundary between the respective possessions of France and Portugal in West Africa. The Tribunal answered this question in the negative[32]. That question is different from the question of territorial sovereignty over insular possessions which is at issue in the present case.

(c) The observation in the French Foreign Ministry's internal note which is cited by Malaysia was referred to in the Award as a possible exception to the Tribunal's finding that:

> "none of the documents presented by the Parties has proven to the Tribunal that in the course of the colonial period France and Portugal considered the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention as a general maritime boundary between their possessions"[33].

The Tribunal concluded that the internal note, although referring to "islands situated along the coast" (but without naming them), seemed only to allude to "the coastal islands, indubitably situated in territorial waters". In its context the Award was merely stating that the reference in the French internal note to islands within territorial waters could not be taken as indicating that the lines established by Article I of the Convention were treated by France as providing for a general maritime boundary. The Tribunal was *not* asserting, as Malaysia appears to suggest, that agreement upon a line extending out to sea only affects coastal islands clearly situated in territorial waters.

(d) It may be noted that Article I of the 1886 Convention constituted what might nowadays be referred to as an 'allocation treaty': it prescribed a line - referred to as a "boundary" - "separating the Portuguese possessions from the French possessions", and it did so by reference to parallels of latitude or meridians of longitude. No question as to territorial sovereignty of islands lying on one side or the other of those lines was in issue in the arbitration, the only question being, as stated above, the determination of a maritime boundary.

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[32] *Ibid.*, paras. 67, 84.

[33] *Ibid.*, para. 61.

Section 4. The Naval Survey of May-June 1891

1.34 Indonesia has explained the circumstances of this survey of areas relevant to the present dispute by two British naval vessels (HMS *Egeria* and HMS *Rattler*) and one Dutch naval vessel (HNLMS *Banda*) in mid-1891[34].

1.35 The main elements were as follows:

(i) The proposal for the survey was raised with the Dutch Government following instructions sent by the British Foreign Office on 29 December 1890 to the British Minister in The Hague[35];

(ii) the Dutch Government had no objections, but were unwilling to let British vessels carry out the survey on their own: they wished to be associated with it and made their own proposals as to the tasks to be undertaken[36];

(iii) HMS *Egeria* arrived in the area in March 1891, arriving at Sandakan on 14 March 1891, and was instructed to survey the coast and islands around Darvel Bay[37];

(iv) HMS *Egeria* surveyed Sipadan and Ligitan, and established stations on Mabul and Sipadan, during May 1891[38];

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[34] IM, paras. 5.34-5.40.
[35] *Ibid.*, para. 5.34.
[36] *Ibid.*, paras. 5.34-5.36.
[37] MCM, paras. 2.35-2.36.
[38] IM, para. 5.39; MCM, paras. 2.37, 2.39.

(v) on 1 June the *Egeria* met up with the *Rattler* and *Banda* near Broershoek, to erect beacons on the 4° 10′ N parallel where it crossed the coast of Borneo and the west and east coasts of Sebatik, and to explore the Simengaris River[39];

(vi) on 27 June the *Egeria* returned to Sandakan, and after 2 weeks rest continued her survey activities[40];

(vii) the *Egeria* stayed in the area until 27 August 1891[41];

(viii) the *Egeria* returned to resume the survey of Darvel and St. Lucia Bays from 28 March to 29 August 1892[42], visiting Ligitan during her cruise, although despite Malaysia's assertion to the contrary, there is no mention of a visit to Sipadan either in Commander Field's account in the *British North Borneo Herald*[43] or in the Notes at Annex 90 of Indonesia's Memorial[44].

1.36 The reason why it was proposed that the survey should be undertaken when it was (May-June 1891) was that the British Admiralty considered that the healthy season in the region ended at the end of July and it was necessary (if the survey was to be undertaken in 1891) that it be undertaken before then as thereafter no British naval vessels would be in those waters[45].

1.37 As Malaysia notes[46], and as Indonesia stated in its Memorial[47], the original initiative for the *Egeria's* survey came in December 1890 from the British side, although it was limited to the fixing of the 4° 10′ N point on the mainland coast: the suggestion for also exploring the Rivers Simengaris and Soedang came from the Dutch, on 28 January 1891[48], as did the suggestion for fixing the 4° 10' N points on the west and east coasts of Sebatik, on 7 April 1891[49]. Thus it is apparent that this whole exercise was conceived well before the 1891 Convention was concluded on 20 June 1891, and also before the 4° 10' N line had been finally agreed as the limit for British and Dutch possessions in Borneo: identifying the various locations on the 4° 10' N line was a useful contingency exercise, given the possibility that that line might subsequently be agreed to be the boundary. The Dutch Foreign Minister's letter of 20 January 1891 had referred to "la possibilité que ce point [le point sur la côte où se trouve le parallèle 4° 10' latitude sud [*sic*]] soit adopté par la suite comme point de départ de la limite entre les possessions Néerlandaises et Anglaises..."[50]. Malaysia itself acknowledges that "the boundary was not yet decided at the time of the survey"[51]. The British initiative had accordingly been correctly expressed to be "without prejudice" to the conflicting British and Dutch claims[52], the resolution of which had not, at that time, been achieved.

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[39] IM, paras. 5.35, 5.38; MCM, para. 2.39.
[40] IM, Vol. 3, Annex 89.
[41] MCM, para. 2.36.
[42] As to the limited, non-landing nature of the "visit" see below, para. 1.44.
[43] IM, Vol. 3, Annex 89.
[44] *Ibid.*, Vol. 3, Annex 90 ; see IM, para. 5.39 and MCM, paras. 2.36 and 2.40.
[45] Letter of 25 February 1891 from Mr. MacGregor (Admiralty) to the Foreign Office: IM, Vol. 3, Annex 69.
[46] MCM, para. 2.30.
[47] IM, para. 5.34.
[48] *Ibid.*, para. 5.34.

1.38 Malaysia notes that "there was no question of extending the scope of the combined expedition to any other islands [i.e. other than Sebatik]"[53]. The reason is simple: the principal purpose of the survey was to establish where the 4° 10' N line met relevant coasts, and no other islands (and in particular Sipadan and Ligitan) were crossed by that parallel.

1.39 Malaysia further notes that the joint survey ended with the departure of HNLMS *Banda* on 21 June, and that "There was never any question of the *Banda* demarcating a maritime boundary further east, let alone visiting Ligitan or Sipadan"[54]. Indonesia must recall that:

(a) the survey did not have the purpose of "demarcating a maritime boundary" at all;

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[49] MCM, para. 2.32.
[50] IM, Vol. 3, Annex 65.
[51] MCM, para. 2.34.
[52] IM, para. 5.34.
[53] MCM, para. 2.32.
[54] *Ibid.*, para. 2.33.

(b) in any case, "demarcation" of a line in the open sea was not physically possible;

(c) instead, no maritime *boundary* in the high seas existed at that time and therefore no boundary "demarcation" would have been permissible even if possible;

(d) at the time of the survey no line dividing British and Dutch possessions in the area had been agreed, and therefore any purported "demarcation" would not only have been inappropriate but would also have been premature;

(e) nor was any physical identification of a line necessary, since the line then in mind, and subsequently agreed upon, followed a defined parallel of latitude, which was all that was needed;

(f) the survey's purpose did not call for any visit to Ligitan or Sipadan, since neither was crossed by the 4° 10' N line; and

(g) the limitation of the *Banda's* survey activities to the coastal areas of the mainland and the east and west coasts of Sebatik at or near the 4° 10' N parallel in no way means that the 1891 Convention was similarly limited, as suggested by Malaysia[55]. The survey was limited to that area because that was the limit of the specific task given the survey vessels, which as explained was all that was necessary or appropriate: that task was given to them on a contingency basis *before* the 4° 10' N line had been agreed and the Convention concluded in June 1891. It is impossible to use such a survey as a basis for the interpretation of a text which was only negotiated and agreed later.

1.40 Malaysia notes that the *Egeria* visited Sipadan in May 1891 (on its way to the rendezvous with the *Rattler* and *Banda*), and that the British gave no notice to the Netherlands Government as this was undoubtedly British territory. That might indeed have been the

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[55] *Ibid.*, para. 2.42.

British view, for at that stage in the negotiations, before the 4° 10' N line had been agreed, Great Britain would no doubt have acted in accordance with its view of the situation - just as the Dutch, in establishing their station at Batoe Tinagat in September 1879[56], acted in accordance with *their* view of the situation on land without seeking permission from the British authorities. Such British actions, of which there is no record that the Dutch had any knowledge and were therefore in no position to protest, do not establish Dutch acquiescence in British authority over Sipadan. In any event, such actions of the two States before June 1891 say nothing about the scope of the agreement *later* reached in the 1891 Convention: they were actions taken in pursuit of asserted rights which were still being maintained at the times in question, the conflicts in relation to which were only later resolved by agreement upon the Convention line.

1.41 Malaysia acknowledges (as Indonesia had already noted at paragraph 5.36 of its Memorial) that the Dutch were directly engaged in maritime activities in the area and were unwilling to let British naval vessels carry out such activities on their own[57]. Malaysia, however, seeks to limit the truth of this statement to the survey of territory claimed by the Dutch and of the proposed boundary with British North Borneo, and denies its correctness for territory and islands to the east, which were said by Malaysia to be administered by British North Borneo, including Ligitan and Sipadan. That Malaysian attempted limitation lacks weight: in the first place, it once again involves a mere assertion that at that time Sipadan and Ligitan were actually being administered by the BNBC – such bare assertions, unsupported by any evidence of administration of those two islands by the BNBC, is characteristic of Malaysia's arguments in this case; and second, the incident in 1876 involving HNLMS *Admiraal van Kinsbergen* and the island of Mabul[58] (north of Sipadan) shows that Dutch maritime activities in the area were by no means limited to the kind of in-shore areas suggested by Malaysia. Similarly, Sir Rutherford Alcock (BNBC) wrote to Sir Julian Pauncefote (Foreign Office) on 11 January 1884, complaining that "Dutch men-of-war are cruizing in our waters, north of the boundary they themselves claim, viz. Batu Tinagat"[59]. A glance at a map of the area shows that this is a reference to the waters off the south coast of Semporna and thus north of Sipadan and Ligitan. These demonstrations of Dutch maritime activity are consistent with the observation in the Admiralty Pilot (1890 edition)[60] that, as regards Sebatik, "The only information we have of this locality is from the Dutch chart".

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[56] IM, para. 5.3.

[57] MCM, para. 2.38.

[58] ICM, para. 5.42.

[59] Annex 2 to this Reply.

1.42 In paragraph 2.39 of its Counter-Memorial Malaysia suggests that during the joint activities of the *Egeria*, *Rattler*, and *Banda*, the British and Dutch officers were, in conversation, "bound to have touched upon the survey of the *Egeria* in the preceding weeks", and that the Dutch officers "did not consider it worth mentioning in their report" or protesting at such a unilateral British survey of Dutch islands and waters. Indonesia would observe that:

(a) the premise on which this argument rests (that there was "bound to have been" discussion of the *Egeria's* previous survey work) is, again, pure speculation;

(b) if the fact of such discussion was not mentioned in the Dutch report, it was also not mentioned in the reports submitted by either the *Egeria* or the *Rattler*, who must similarly have regarded the matter as of no importance (or as something about which it was better to keep quiet);

(c) in the absence of any evidence of knowledge on the part of the Dutch crew of the *Banda* that there had been a British survey of Dutch-claimed waters around Sipadan (and it has to be borne in mind that the normal route to the rendez-vous point would in any event have taken the *Egeria* past Sipadan), no significance can be attached to any absence of Dutch protest;

(d) similarly, in the absence of any evidence of Dutch knowledge of British transgressions into Dutch-claimed waters, the general cordial relations between the British and Dutch vessels is no matter for surprise;

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[60] MCM, Vol. 2, Annex 1.

(e) in any event, at the time the situation in this area regarding sovereignty was essentially one of competing *claims*, without the certainty which would later follow after the conclusion of the Convention, and attitudes of naval personnel on the spot would be likely to have taken that into account; and

(f) any lack of complaint by the Dutch naval authorities (had any complaint based on knowledge been called for, which it was not) is mirrored by the lack of British complaint when HNLMS *Macasser* sailed into British waters in 1903: as Malaysia explains, "Collaboration was necessary for a complete survey of the coast to establish reliable navigation charts, and relations between the officers were good"[61].

1.43 In assessing the significance of these naval survey operations one general point must be borne in mind. This is that "Given the limited resources available, the colonial powers were more intent on collaboration than on affirmation of respective sovereignties on these small and often featureless islands". Those words are Malaysia's: at paragraph 4.7 of its Counter-Memorial. Moreover, as with the erection of lighthouses, naval surveying is more a matter of the promotion of the safety of navigation than of a manifestation of sovereignty[62].

1.44 The return journey of HMS *Egeria* in 1892 during which she visited Ligitan although probably not Sipadan[63] has to be seen in that light – particularly since, from the evidence relied on by Malaysia[64], the "visit" does not appear to have involved any landing on the island but rather just navigation in their vicinity. There is no evidence that the Dutch authorities knew of this voyage, which in any event was undertaken en route to/from checking the beacons on Sebatik. Such a survey voyage cannot be seen as evidence in support of Malaysia's contention that British sovereignty extended to the islands now in dispute.

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[61] MCM, para. 4.7.

[62] See ICM, paras. 7.41-7.42.

[63] See above, paragraph 1.35(viii).

[64] Namely, IM, Vol. 3, Annex 90.

Section 5. Conclusion

1.45 As shown in this Chapter,

(a) the uncertainties as to the limits of British and Dutch territorial possessions in the region were settled by the 1891 Convention;

(b) the parties wanted by the Convention to settle *all* their differences in the area;

(c) for the offshore area they did so by adopting the 4° 10' N line.

CHAPTER II

INTERPRETATION OF THE 1891 CONVENTION IN THE LIGHT OF THE SUBSEQUENT PRACTICE

Section 1. The Terms of the Convention

2.1 Malaysia devotes paragraphs 2.43-2.48 of its Counter-Memorial to the interpretation of the Convention, attempting to discredit Indonesia's interpretation advanced in its Memorial.

2.2 Indonesia reads the 1891 Convention, according to the natural and ordinary meaning of its terms *in their context* and *in the light of the object and purpose of the Convention*, as dividing British and Dutch possessions along the boundary delimited in the Convention according to the terms of which, from the stipulated point on the east coast of mainland Borneo, it is "continued eastward" along the 4°10' N parallel in such a way as to attribute islands to the north of that line to Great Britain and islands to the south of that line (including Sipadan and Ligitan) to The Netherlands. Malaysia claims that the agreed boundary stops at the east coast of Sebatik.

2.3 The foregoing statement of the Parties' positions mirrors that put forward by Malaysia at paragraph 2.45 of its Counter-Memorial: the passages emphasised above are relevant phrases omitted from Malaysia's summary statement of the Parties' essential positions. Their omission is revealing as to aspects of Indonesia's argument with which Malaysia feels uncomfortable (indeed, Malaysia elsewhere has also, by an omission from a quoted passage, sought to disregard the relevance of the Parties' aim in concluding the Convention – see below, paragraphs 2.8-2.10).

2.4 Malaysia, at paragraph 2.46 of its Counter-Memorial, repeats its earlier argument that the order in which the negotiating process dealt with the boundary was reflected in the order of Articles I to IV of the Convention, and that that somehow affects the meaning of those Articles (and of Article IV in particular). It does not: see above, paragraph 1.32.

2.5 Malaysia seeks to show that because the Convention refers to a "boundary" line, it must be limited only to a boundary on land, excluding any continuation out to sea[1]. Indonesia has shown that use of the term "boundary" is not limited to land territory[2].

2.6 Malaysia seeks to show that because the Convention uses the word "continue" in relation to the westward boundary (which does not extend out to sea), the use of the same word in Article IV similarly excludes continuation out to sea[3]. But Malaysia misses the important point (explained at paragraph 5.20 of Indonesia's Counter-Memorial) that the westward Article (Article II) stipulates that the westward boundary "continues" westward *to a specified point*, whereas Article IV contains no such terminal point: the reason is that at the western end of the land boundary there were no islands near the shore, and the more distant islands (the South Natuna islands) were indisputably Dutch. This difference between Articles II and IV is clearly illustrated on the Explanatory Memorandum Map.

2.7 Malaysia seeks to deny the extension of the 4°10′ N line eastward of Sebatik by asserting that the island of Sebatik is the limit of the line's eastward continuation[4]. But this is to assert what has to be proved. That Article IV did deal with the island of Sebatik is not in dispute: that it dealt *only* with that island, and with no other islands north or south of the agreed line, is at the heart of the dispute. Assertion is not even argument, let alone proof.

2.8 Malaysia's representation of Indonesia's fourth argument, at paragraph 2.47(d) of its Counter-Memorial, is simply wrong because it is incomplete, and as a result Malaysia has wholly misunderstood Indonesia's argument. Malaysia states the Indonesian argument in the following way:

> "Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, an interpretation which would leave open the question of attribution of various small offshore islands would be inconsistent with that purpose".

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[1] MCM, para. 2.47(a).
[2] ICM, paras. 5.8, 5.12; and see also paragraph 1.33(d), above.
[3] MCM, para. 2.47(b).
[4] *Ibid.*, para. 2.47(c).

That purported statement is meaningless, since the last two words ("that purpose") have nothing to refer back to. It is also incomplete, although Malaysia gives no indication that words have been omitted from the quotation.

2.9 The correct statement of Indonesia's argument, as put in its Memorial at paragraph 5.43(d), is as follows (with the words omitted from the Malaysian version in italics):

> "Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan included various islands, including certain islands adjacent to the main islands of Tarakan, Nanoekan and Sebatik, *and the desire on both sides to settle the boundary problem once and for all (as to which see, also, paras. 5.56-5.59, below)*, an interpretation which would leave open the question of attribution of various small offshore islands would be inconsistent with that purpose".

2.10 Thus the crucial point in the Indonesian argument is not just that the Dutch believed that they had good claims to various islands, but also that it was the common intention to settle all such problems for the future[5]. The importance of a main purpose of the Convention being to put an end to *all* future territorial disputes in this area cannot be underestimated when seeking to interpret its terms: it is a purpose shared by Great Britain, whose early proposal for a settlement was for "a compromise of *all* conflicting claims"[6]. In addition to the wish to avoid future disputes, there was also concern as to the possible future complications from other States. As the Dutch Foreign Minister observed in discussion with the British Minister at The Hague, it was:

> "desirable [...] that the two Powers [...] should come to a *complete* understanding which would not leave room for any third Power to step in at any time and claim territory there as being res nullius. We had, he said, in our negotiations with Spain for the surrender of her claims on the Northern part of the Island, sufficient experience of the difficulties we might have to deal with"[7].

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[5] IM, paras. 5.43(d), 5.56-5.59; ICM, para. 5.39.

[6] IM, para. 5.7. Emphasis added.

[7] Sir H. Rumbold's despatch of 19 November 1888 to Lord Salisbury, IM, Vol. 2, Annex 35. Emphasis added.

An interpretation which would leave the status of various claimed islands (both north and south of the agreed line) unclear would not be consistent with that manifest purpose underlying the settlement achieved by the Convention.

2.11 The obvious political intention to settle these North Borneo territorial matters once and for all is fully consistent with views expressed by the Court. In several cases involving the application of boundary agreements where no extraneous questions of validity or applicability have been in issue, the Court has affirmed a general presumption that boundary settlements are intended to be both comprehensive and final.

2.12 The observations of the Court in the case concerning *Sovereignty over Certain Frontier Land* have been noted previously by Indonesia[8], as have those of the Permanent Court in its 1925 Advisory Opinion on the *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*[9].

2.13 To similar effect the present Court, in the *Temple of Preah Vihear*, noted that:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality"[10].

Again, in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court considered that the Treaty before it - the 1955 Treaty between Libya and France - "was aimed at settling all the frontier questions, not just some of them"[11]. In reaching that conclusion the Court observed that

> "In the expression [in Article 3] 'the frontiers between the territories...', the use of the definite article is to be explained by the intention to refer to all the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible"[12].

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[8] IM, para. 5.60, at p. 94.

[9] *Ibid.*

[10] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 34. See also IM, para. 5.59.

[11] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6 at p. 24, para. 48.

[12] *Ibid.*

The use of the definite article in the preamble to the 1891 Convention ("defining *the* boundaries between *the* Netherlands possessions in the Island of Borneo and *the* States in that island which are under British protection": emphasis added) similarly reveals the intention of the parties to allocate *all* the territories in the area, not just some of them[13].

2.14 Malaysia nevertheless appears to suggest that an interpretation of Article IV which would put on the Dutch side of the line islands which were some 50 miles offshore is in some way "wild" and not to be countenanced[14]. Yet, to take two other well-known treaties applying to the same region, both the U.S.-Spain Peace Treaty of 1898, and the Anglo-U.S. Convention of 1930, both of which are relied on in other contexts by Malaysia, attribute to the one party or the other small islands falling within the scope of the treaty even though they are in several instances 50 miles *or more* away from the nearest mainland or even large island, and do so by the use of "boundary" lines attributing islands in accordance with which side of the line the islands lie on.

2.15 Malaysia challenges Indonesia's assertion that the initial British proposal was for a line running out from Broershoek through the channel between Sebatik and Nanoekan, and that such a line would inherently be a line running out to sea[15]. For the reasons given in paragraph 1.31 above, including in particular the maps used in the negotiations and to which attention is there drawn, Indonesia sees no reason to depart from the position it has adopted. As will be shown below (paragraph 2.27), Malaysia acknowledges[16] that the Dutch Explanatory Memorandum Map showed the British proposal (i.e. the line coloured green) as a line extending out to sea.

2.16 Malaysia dissents from Indonesia's assertion that the use in Article IV of the term "along" (i.e. "along that parallel") confirms that a line of indeterminate length was intended[17]. Malaysia's response, that the sentence continues with the words "across the island of Sebatik" does not advance the argument in any way. If by those additional words Malaysia seeks to show that the island of Sebatik constitutes the terminal point for the line, then once again

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[13] See also ICM, para. 5.38.
[14] MCM, paras. 2.47(d) and 2.66.
[15] *Ibid.*, para. 2.47(e).
[16] *Ibid.*, para. 2.55.
[17] *Ibid.*, para. 2.47(f).

Malaysia is substituting self-serving assertion for argument. That the line continues "along" the 4°10' N line is clear; that it continues "across the island of Sebatik" is equally clear; that it stops there, as Malaysia contends, is not clear, and no amount of mere assertion by Malaysia will make it so.

2.17 Malaysia seeks to dismiss Indonesia's grammatical analysis of Article IV as "pure fiction", and as a "convoluted grammatical hypothesis", and claims that Indonesia is attempting to strike out the reference to the island of Sebatik[18]. As to that latter point, it is patently absurd: nowhere does Indonesia suggest that the reference to Sebatik should be treated as if it were not there: on the contrary, Indonesia expressly stated that it did play a role, "as a subsidiary description, for purposes of clarification", and recognised its consequences in paragraphs 5.43(i) and (j) of its Memorial. Malaysia may disagree with Indonesia's interpretation of the text in relation to the mention of Sebatik, which in Indonesia's view follows clearly from the structure of the sentence. If Malaysia disagrees with Indonesia's analysis of the terms of the Convention, Malaysia should not only say so (as it has, at least by implication) but should say why it does so. Unfortunately for Malaysia, grammar is essential to the attribution of meaning to language. Impatient dismissal of an inconvenient argument inspires no confidence in the merits of that dismissal. In the absence of any argument offered by Malaysia, Indonesia sees no reason to reconsider its grammatical analysis of Article IV, which supports Indonesia's view that the main clause of the Article is indisputably that the line "continues eastward along that parallel".

2.18 Astonishingly, Malaysia itself goes on immediately to invoke the grammatical significance of a semi-colon (actually a colon) in seeking to refute the meaning attributed by Indonesia to the word "across"[19]. Instead of following Malaysia in impatiently dismissing such a grammatical argument, Indonesia points out that:

(a) Malaysia's view of the meaning of the word "across" is at odds with Indonesia's view, as to which see not only paragraph 5.43(h) of Indonesia's Memorial but also now paragraphs 5.22-5.23 of its Counter-Memorial; and

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[18] *Ibid.*, para. 2.47(g).

[19] *Ibid.*, para. 2.47(h).

(b) **Malaysia's assertion that Indonesia was simply striking out the words after the colon, and its argument about the significance of the colon, are fully dealt with in Indonesia's Counter-Memorial, at paragraphs 5.24-5.25.**

2.19 Malaysia seeks to deny that the principal thrust of Article IV is that the 4° 10' N line "continues eastward along that parallel", and calls such a view "imaginary"[20]. Yet again, Malaysia, in the absence of good arguments, resorts to impatient dismissal. The reason why the principal thrust of Article IV is as Indonesia says it is, is simply that that *is*, as a matter of elementary grammar, the main clause of the sentence. Indonesia notes that Malaysia accepts that the "clarification says what it says, i.e. that the boundary crosses the island of Sebatik, dividing it in two": Indonesia agrees (particularly with Malaysia's acceptance of the reference to Sebatik as merely a "clarification"), but must add that that says nothing about the matter at issue, namely whether the line stops at the point at which 4°10' N crosses the east coast of Sebatik or whether, as the main clause of the Article says, it "continues eastward along that parallel".

2.20 Malaysia purports to misunderstand Indonesia's assertion that, apart from the attribution of islands to one Party or the other, there was no contemporary reason that the 4°10' N line should have extended out to the high seas[21]. Indonesia did *not* say, as Malaysia suggests, that there was no reason to extend the line out to the high seas: Indonesia said that there was no reason to do so "*other than the attribution of islands to one Party or the other*". Malaysia is wrong in saying that there were no disputed islands to allocate: Indonesia has shown, in its Memorial and also in its Counter-Memorial, that there was uncertainty about the maritime extent of territorial claims in the region, and that those claims – however insubstantial one side or the other might have considered them to be – which might have been the source of future discord, were put to rest by the 1891 Convention. Contrary to Malaysia's assertion, that is why under the 1891 Convention the 4°10' N line *did not* stop at the east coast of Sebatik but, as Article IV stipulated, "continued eastward along that parallel".

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[20] *Ibid.*, para. 2.47(j).

[21] *Ibid.*, para. 2.47(k).

2.21 Malaysia makes a wholly irrelevant riposte to Indonesia's statement that the continuation out to sea of the Convention line was consistent with the location of other Dutch possessions to the east, south of the Philippines[22]. Malaysia points out that the issue was not a neat delimitation of Dutch and Spanish possessions, but was rather the fixing of an Anglo-Dutch boundary in north-east Borneo. That is true – but does not in any way undermine the assertion, which remains correct and uncontradicted by Malaysia, that that Anglo-Dutch Borneo settlement was consistent with the location of other Dutch possessions in the area.

2.22 Malaysia's attempt to discount Indonesia's argument that the parties' concerns did not stop at the eastern limit of Sebatik but continued eastward into navigationally significant waters out to sea lacks all substance[23]. The scope of the joint naval survey in May and June 1891, and its significance, has been discussed at paragraphs 1.35-1.44 above. That the survey stayed close to Sebatik was the result of the limited instructions given to the survey vessels, and had no implications for the meaning of the later Article IV of the Convention: their survey was not carried out in pursuance of any provision in the Convention, and was carried out *before* (and on the basis of instructions given *well before*) agreement was reached on the 4°10' N line and text of the Convention was adopted.

2.23 Malaysia's reliance on a *dictum* of the Tribunal in the *Guinea-Guinea Bissau* case[24] is misplaced. The issue before the Tribunal arose out of the terms of Article I of the Franco-Portuguese Convention of 1886[25], and concerned the question whether those terms established a maritime boundary between the parties' possessions. The Tribunal answered that question in the negative. In doing so it noted:

> "that there was no question of territorial waters, either in the other negotiation protocols or in the official dispatches, notes or documents immediately prior to *or following* these negotiations, with the single exception of the internal note of the French Ministry of Foreign Affairs mentioned in paragraph 61 above[[26]]. Thus an essential condition required to determine a maritime boundary did not exist"[27].

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[22] *Ibid.*, para. 2.47(l).

[23] *Ibid.*, para. 2.47(m).

[24] *Ibid.*, para. 2.48.

[25] See above, para. 1.33, in particular sub-para. (b) for a summary of the effect of Article I.

[26] See above, para. 1.33(a).

[27] *Guinea-Guinea (Bissau) Maritime Delimitation Case* (1985), ILR 77, p. 636 at p. 673, para. 79. Emphasis added.

It was in that context that the Tribunal went on to observe that:

> "In the absence of any textual evidence, there is every reason to presume that the negotiators never envisaged anything but the land boundaries"[28].

This situation was very different from that of the 1891 Anglo-Dutch Convention. Not only were the issues quite different (maritime boundaries, not territorial sovereignty) but in relation to the 1891 Convention there was documentary evidence, both before, in, and after the conclusion of the Convention, showing that the negotiators intended that the line which they were laying down should continue eastwards out to sea along the 4°10' N parallel of latitude.

2.24 As to Malaysia's final point in paragraph 2.48 of its Counter-Memorial that, especially in 1891, a "boundary" could in no way be drawn in the open sea beyond territorial waters, Malaysia appears to have forgotten:

(a) that in the area in question the line was a line dividing possessions of the two Parties, and was, at sea, a line of attribution;

(b) that the use of the term "boundary" is not uncommonly used in relation to such maritime lines of attribution (and was so used in the Anglo-U.S. Convention of 1930[29], and in Article I of the Franco-Portuguese Convention of 1886 which was the subject of the *Guinea-Guinea Bissau* arbitration[30].

Section 2. The Explanatory Memorandum Map

2.25 As explained in paragraphs 5.44-5.45 of Indonesia's Memorial, and paragraphs 5.82 and 5.94 of its Counter-Memorial, The Netherlands ratified the 1891 Convention. This was expressly provided for in Article VIII of the Convention. As part of that ratification process, the Netherlands Government formally submitted to its Parliament a Map illustrating the outcome of the Convention[31]. That Map showed in red the line agreed in the Convention extending out to sea eastwards of Sebatik: the legend described that red line as the "line set out in Convention". The British Government knew of and acquiesced in that Map.

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[28] *Ibid.*
[29] See further ICM, paras. 5.8 and 5.12.
[30] See above, para. 1.33(d).

2.26 Malaysia deals with these matters in its Counter-Memorial principally at paragraphs 2.49-2.59, and in passing in several places but in particular at paragraph 5.8.

2.27 At paragraph 2.55 of its Counter-Memorial Malaysia poses a number of questions, intended to show that there was no rhyme or reason in the depiction of the agreed line as continuing out to sea for some 50 miles. Malaysia no doubt intended its questions to be merely rhetorical. But in fact all are capable of straightforward answers, which show that there was reason (if not rhyme) in the depictions on the Explanatory Memorandum Map.

(a) There was no discrepancy between the Convention and the Explanatory Memorandum Map, as implied by Malaysia: Article IV provided for the line to be "continued eastward", and the Map showed just that - it illustrates with abundant clarity exactly what was intended by the terms of Article IV.

(b) Malaysia goes on to ask why the red line (i.e., the agreed Convention line) ran out to sea: as just noted, it did so because such a 'continuation eastwards' was what Article IV required.

(c) Malaysia professes to find it odd that the green line (i.e., the British proposal) ran out to sea: but it did so because that was exactly what the British proposal envisaged[32].

(d) Malaysia asks why the red line lengthened between its first draft on 23 June and the final version submitted with the Explanatory Memorandum on 25 July 1891: first because it is in the nature of drafts that they are subject to change, and second (if one is looking for a possible reason for this particular change) it could lie in the wish to show more clearly the effect of Article IV – the first draft showed unmistakably that the line continued eastwards out to sea, but an even clearer depiction of that result was shown in the final version (perhaps inspired by the eastward extent of the British proposal – see above, paragraph 1.31 – which went approximately the same distance out to sea). It thus shows an intentional rendering of what Article IV provided, rather than some accidental carelessness.

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[31] See Map No. 5 in the Map Atlas submitted with Indonesia's Memorial.

[32] See above, paras. 1.31 and 2.15.

(e) And finally, why was the line not continued out until it met the Spanish possessions? - because the purpose of the Convention, and the line agreed in it, was nothing to do with the delimitation of Dutch-Spanish interests: as Malaysia itself put it, "The 1891 Boundary Convention was not concluded with Spain, but with Great Britain. The issue was not a neat delimitation of the Dutch and Spanish possessions [...]"[33].

Far from there being, as Malaysia puts it, "no logic to all this", there is in fact abundant logic, and the whole picture fits together extremely well in the manner suggested by Indonesia.

2.28 In paragraph 2.56 Malaysia professes to see in the Netherlands Government's reply to a question put to it, and in particular the absence of any mention in that reply of the Map in relation to the continuation of the line out to sea, some sort of acknowledgement that the Convention did not provide for a line going out to sea. Several points are called for in response to this argument:

(a) The Government's reply was related to the question put to it: it was asked to give a particular declaration, and it did so. It is quite usual for Governments, in such circumstances, not to volunteer answers going beyond the question put.

(b) The Government's reference to "all that lies to the south of the border (as defined in the agreement)" includes, of course, Article IV, and the 'continuation eastwards' of the agreed line *was* "defined in the agreement".

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[33] MCM, para. 2.47(I).

(c) The reference in the question, and in the reply, to possessions "in the island of Borneo" does not exclude off-shore islands where, as here, the text of the Convention was apt to cover them: see paragraph 5.14(e) of Indonesia's Counter-Memorial.

(d) The Government had no need to refer specifically to the Map: it was before Parliament, and Members of Parliament were to be taken to be familiar with documents placed in front of them.

2.29 Malaysia, in a different part of its Counter-Memorial, criticises the accuracy of the Map, and in particular its omission to show Sipadan or to name Ligitan[34]. In doing so Malaysia misses the point. First, many islands and similar features were not shown or identified on the Map: thus, a comparison between the Map (see Map No. 5 (Enlargement) in the Indonesian Map Atlas) and Map No. 23 (Enlargement) in the same Atlas shows that the former gives a very simplified representation of maritime features and in particular does not, for example, indicate P. Kapalai, Ligitan Reefs, Friedrich Reef, Roach Reefs, Alert Patches, P. Kumpung, Heel Reef, or Hand Rock, all of which are shown and named on Map No. 23 (Enlargement). But second, and more importantly, so long as the Map correctly shows the agreed 4°10' N line which separates Dutch and British possessions in the area (which it does), the attribution of small islands - and both sides agree that the two islands now in issue, as well as many on the northern (i.e., British) side of the line, *are* very small - follows automatically from their location in relation to that agreed line, and is not dependent upon their visibility on a map.

2.30 Malaysia's attempt, at paragraph 2.58 of its Counter-Memorial, to avoid the consequences of the British Government's actual knowledge of the Map and its failure to react against it in any way (it reacted *in favour of* it by putting it in its official archives) is singularly unconvincing. Malaysia does not deny that the Map was a matter of public knowledge for those concerned; Malaysia cannot deny that the British Government was among "those concerned"; Malaysia accepts that the British Minister in The Hague called the attention of Lord Salisbury to the Map - and it is to be noted that Sir Horace Rumbold's Despatch expressly described it as a map "showing the boundary-line *as agreed upon under the late Convention*" and drew specific attention to the Map as "the only interesting feature"[35].

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[34] MCM, para. 5.8.

2.31 There can therefore be absolutely no question but that the British Government, at the highest levels, was aware of the Map, and thus of all the lines on it, including the red line showing - as the legend on the Map clearly stated - what had been agreed in the Convention. The British Minister in The Hague had no need to single out for attention the line running out to sea: it will have come as no surprise to him since, as he put it in his Despatch, it was the map showing the boundary-line "as agreed in the Convention". Similarly, the fact that neither Lord Salisbury, nor Sir Edward Hertslet who had been one of the chief British negotiators, reacted against the Map shows that there was nothing in it to cause them concern as being inconsistent with the Convention. The internal Foreign Office receipt slip for Sir Horace Rumbold's despatch affords clear evidence that the despatch was received in the Foreign Office[36], that copies of the Map were with it, that it was marked to Sir Edward Hertslet to see, and that, by virtue of the tick against his name and his initials below it, he did in fact see it. It is pure speculation, backed by no evidence whatsoever, to suggest that the British would "probably" have been more interested in the land boundary as traced across the island of Borneo and the comparison between the four proposals: but even if this speculation is taken as correct, it would at the same level of speculation be scarcely imaginable that senior officials familiar with the course and outcome of the negotiations would have looked with interest at the land-related parts of the lines and then simply not noticed that one of them – the crucial line depicting what was agreed – continued out to sea.

2.32 In short, the British Government knew of the Map and had a copy in their possession contemporaneously with the Dutch ratification process and well before instruments of ratification were exchanged on 22 May 1892; and the British Government failed in any way to object to its depiction of the line agreed in the Convention. The British Government acquiesced in that Map – correctly so, for it simply depicted the line 'continuing eastwards' as stipulated in the Convention: to use the language in which Sir Horace Rumbold reported the

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[35] IM, Vol. 3, Annex 81. Emphasis added.

[36] A copy is at Annex 3.

Map back to Lord Salisbury, it was the Map "showing the boundary-line as agreed upon under the late Convention"[37].

2.33 Contrary, therefore, to what Malaysia says[38], the British Government did accept the Map as an instrument related to the treaty. Its acquiescence in the Map involves its acceptance of it; and the British Government knew that it had been prepared in connection with the conclusion (i.e., ratification) of the treaty and depicted the line agreed in it – i.e., it was demonstrably an instrument related to the treaty, as required by Article 31.2(b) of the Vienna Convention.

2.34 Malaysia's attempt to distinguish the *Livre Jaune* map in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case is unconvincing[39]. To argue, as does Malaysia, that in that case (but, by implication, not in the present case) the relevant treaty text was not free from ambiguities and made different interpretations possible, is to fly in the face of reality. The whole issue in this case, as the pleadings have amply demonstrated, shows that different interpretations of Article IV are being put forward by the two Parties, and the Explanatory Memorandum Map – like the *Livre Jaune* map – shows the line agreed in the Convention and acquiesced in by the other Party as a correct delineation of the agreed line.

2.35 For Malaysia to go on to argue that the parties, far from agreeing to the Explanatory Memorandum Map, agreed to a different map in 1915 is wilfully to confuse a Map drawn by one Party and acquiesced in by the other, depicting the line agreed in the 1891 Convention, with a map limited to illustrating only the small portion of the boundary which was the subject of the 1915 Agreement (see further, paragraph 2.47 below). In no way can the very limited 1915 map be compared with, let alone prevail over, the Explanatory Memorandum Map, except in respect of the limited stretch of boundary dealt with in the 1915 Agreement: the 1915 map is wholly irrelevant to any other stretches of the boundary, whether to the west or to the east of the limited stretch to which it referred.

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[37] IM, Vol. 3, Annex 81.

[38] MCM, para. 2.63.

[39] *Ibid.*, para. 2.64.

2.36 As to Malaysia's cursory dismissal of the significance of the Court's statements in the *Temple* case, it too lacks conviction[40]. It cannot be said, as Malaysia does in relation to the circumstances surrounding the Explanatory Memorandum Map, that the "circumstances did not call for any particular reaction". Where a State which has just concluded an important boundary treaty, and is made aware through official channels and as a matter of public knowledge, that the other Party is, in an official and public document, maintaining a particular view of the meaning of the treaty, it stays silent at its peril. The fact, so far as it may be true, that nobody mentioned the Map in the debates in the Netherlands Parliament or drew attention to the line's continuation out to sea, is no justification for the directly concerned other Party not to look carefully at what is put before it: there was nothing reticent about the depiction of the (agreed) red line on the Map, and its existence and purport were manifest at even the quickest glance – the Map's legend expressly described the red line as the "line set out in Convention". If the Party disagrees it must say so, and if it does not say so, it will be taken to have acquiesced. In this instance, Great Britain's acquiescence is not only evident as a matter of law, but is readily understandable as a matter of fact, since the depiction of the red line conformed to what Article IV said and will have come as no surprise to the British Government.

Section 3. The Irrelevance of the 1915 and 1928 Agreements

2.37 In its Memorial[41] and Counter-Memorial[42] Indonesia submitted that the agreements concluded in 1915 and 1928 were irrelevant to the application of the 1891 Convention to the islands of Sipadan and Ligitan. Although Article V of the Convention envisaged that the boundary described in the Convention would need further elaboration in detail, and that the 1915 and 1928 agreements were concluded pursuant to that provision in relation to certain limited parts of the agreed line, the seaward extension of that line did not call for any further precision since it was determined by reference to a parallel of latitude, and circumstances at sea did not allow for any specific demarcation.

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[40] *Ibid.*, para. 2.65.

[41] See IM, para. 5.65.

[42] See ICM, paras. 5.97-5.118.

2.38 Malaysia, on the other hand, places great store by the conclusion of the 1915 Agreement, and the map attached to it[43]. Malaysia's belief in the significance of this Agreement and map is misplaced.

2.39 Indonesia agrees with Malaysia that Article 31(3)(a) of the Vienna Convention requires that "any subsequent agreement between the parties [to a treaty] regarding the interpretation of the treaty or the application of its provisions" has to be ("shall be") taken into account, together with the context of the treaty.

2.40 The significance of this provision must be properly understood. Article 31 lays down the general rule of interpretation of treaties. Paragraph 1 requires (so far as here relevant) that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context [...]". Paragraph 2 stipulates what is to be regarded as the context of a treaty for the purpose of its interpretation. Paragraph 3 then requires that any subsequent agreements of the kind referred to are to be "taken into account, together with the context".

2.41 Two points about paragraph 3 should be mentioned. The subsequent agreements are only to be "taken into account": they are not necessarily decisive. And in particular there is nothing in Article 31 which suggests that a treaty delimiting in detail a small part of a boundary already delimited in general terms in some way governs the delimitation of the rest of the boundary. In so far as a subsequent agreement is to be taken into account, it is only for the purpose of serving, alongside the context of the original treaty, as a relevant consideration in establishing the ordinary meaning of that treaty's terms – for that is the only purpose under Article 31 for which the context of a treaty is relevant.

A. The 1915 Agreement

2.42 The 1915 Agreement was an agreement between the parties to the 1891 Convention in application of its provisions. In particular, it was concluded in application of Article V of the 1891 Convention. That Article provides:

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[43] MCM, paras. 2.67-2.78, 2.79(f).

"The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherlands and British Governments may think fit".

In effect, therefore, the parties agreed in 1891 that there would be a later demarcation on the ground of the boundary delimited in the 1891 Convention.

2.43 An occasion for such a demarcation arose in 1910. The circumstances were recounted in Indonesia's Counter-Memorial, at paragraph 5.104, *et seq*. It is apparent from paragraph 4 of the letter of 11 March 1913 to the BNBC from the Governor of British North Borneo reporting the completion of the work of the demarcation commission that the demarcation owed much to uncertainties about the proper limits of tax collectors' activities[44]. The internal report of 24 February 1913 submitted by the two British Commissioners[45] when formally submitting to their authorities the Joint Report of the British-Netherlands Commissioners of 17 February 1913[46] sets out in paragraphs 4 and 6 respectively the terms of the Commission given to the British Commissioners and of the instructions given to the Dutch Commissioners: these instruments add nothing of significance to the purpose of the Commissioners' work, other than that they were instructed to demarcate the boundary to the extent necessary.

2.44 The result was a boundary demarcation carried out on the spot by representatives of the two Governments. They started their work on the east coast of Sebatik, and worked their way westwards into the mainland of Borneo - but by no means the whole way along the mainland Anglo-Dutch boundary. In fact, as the sketch map at Annex 26 of Indonesia's Counter-Memorial shows, the demarcation only went a relatively short distance into mainland Borneo, covering only approximately 20% of the mainland boundary.

2.45 Malaysia attaches significance to the fact that the Commissioners started their demarcation work at the point on the east coast of Sebatik where it is crossed by the 4°10′ N line of latitude. Malaysia seeks to draw from this the conclusion that the line prescribed by the 1891 Convention did not extend further east than the coast of Sebatik.

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[44] Annex 11.

[45] Annex 10.

[46] ICM, Vol. 2, Annex 25.

2.46 Such a conclusion is wholly unjustified.

(a) The task of the Commissioners was to "demarcate" the boundary. Demarcation at sea is neither possible nor necessary[47].

(b) The task of the Commissioners was to demarcate the "boundary". In the absence of any islands east of Sebatik which the 4°10' N line crossed, there was no "boundary" to demarcate.

(c) The fact that the Commissioners' *work* started at the east coast of Sebatik does not mean that the *Convention line* started there (any more than the fact that the Commissioners' work ended only some 20% along the boundary meant that the boundary ended there). It is in fact noteworthy that paragraph 3(1) of the Commissioners' Report does not say (as Malaysia's Counter-Memorial suggests, at paragraph 2.74; also 2.78(a)) that the boundary starts on the east coast of Sebatik. The Report actually says only:

> "(1) Traversing the island of Sibetik, the frontier line follows the parallel of 4°10' north latitude [...]"[48].

This is perfectly consistent with the Convention line having begun further east and then, when it reaches Sebatik from the east, continuing across that island. It is only Malaysia which seeks to interpret the word "Traversing" as meaning "starting" – which it manifestly does not – indeed, if anything the word "traversing" suggests not that the line started at the first point mentioned but that it was already in existence out to the eastwards and then, upon reaching the island of Sebatik, crossed that island along the stated parallel of latitude.

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[47] ICM, paras. 5.112 and 5.117.

[48] MM, Vol. 2, Annex 25.

(d) The fact that the Commissioners' Report refers to the interpretation of Article 2 of the Treaty mutually accepted by the Netherlands and British Governments in 1905 does *not*, contrary to what is said by Malaysia, "implicitly, but decisively, exclude any other mutually accepted agreement in the vicinity"[49].

(i) Given that the Commissioners' task was to demarcate the boundary, it was entirely natural for them to identify their task by reference not only to the terms of the original treaty (the 1891 Convention) but also to the terms of a subsequent agreed interpretation of those terms.

(ii) The implicit parallel between the 1905 agreed interpretation and some "other mutually accepted agreement in the vicinity" is fallacious, if by such "other" agreement Malaysia means an agreement about the seaward extension of the 4°10' N line. That seaward extension was not the result of some "other" agreement, but was an integral part of the 1891 Convention itself.

(iii) Since the task of the Commissioners was to demarcate the boundary, which could not be done on the open sea, there was no reason whatsoever for The Netherlands to mention the fact that the 1891 Convention embodied an agreement that the line it prescribed continued out to sea. Such seaward continuation of the line was irrelevant to the purpose of the Commissioners' task.

2.47 The map attached to the Commissioners' Report does not have the significance given to it by Malaysia at paragraphs 2.75, 2.76 and 2.78(b) of its Counter-Memorial. That map appears to have accompanied the Commissioners' Report: it is so referred to in the preamble to the 1915 Agreement (although the Report itself makes no reference to the map) and the two Governments confirmed it. But it does not purport to be a map of the whole length of the

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[49] MCM, para. 2.74.

1891 Convention line: it is merely a map of that part of the line demarcated on the spot by the Commissioners. Just as their work covered only a limited part of the boundary, so did their map. Its failure to include other parts of the Convention line, whether to the west or the east, implies absolutely nothing about such continuations of the Convention line, other than that those continued parts of the line were not dealt with by the work of the Commissioners.

B. The 1928 Convention

2.48 Malaysia's invocation of the 1928 Convention in this context is even more misplaced than its reliance on the 1915 Agreement. The conclusion of the 1928 Convention is said[50] to have been "another" opportunity for the Netherlands Government, if it had had second thoughts, to correct the 1915 map and agreement.

2.49 As explained, the conclusion of the 1915 Agreement was irrelevant to the continuation of the 1891 Convention line east of Sebatik. The conclusion of the 1928 Convention was even further removed from any relevance to that matter. As is vividly shown on the sketch map at Annex 26 of Indonesia's Counter-Memorial, the 1928 Convention dealt only with a tiny sector of the inland boundary on the mainland of Borneo, well over towards the western end of that boundary, i.e. almost at the opposite end of the boundary from Sebatik and the continuation of the Convention line eastwards beyond that island.

2.50 Not only was the subject matter of the 1928 Convention far removed from the area of any pretended Indonesian concern with the demarcation and map of 1913/1915, but in fact Indonesia has no problems with that demarcation and map. As respectively a demarcation of a particular section of the boundary, and as a map recording the extent of that demarcation, The Netherlands accepted them, as does Indonesia now: but they are simply irrelevant to the point at issue, namely whether the line prescribed by the 1891 Convention continued eastwards along the 4° 10' N parallel of latitude beyond the east coast of Sebatik. Thus, The Netherlands had no need to look for "another opportunity" to "correct" the 1915 Agreement and map.

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[50] *Ibid.*, para. 2.77.

Section 4. Internal Dutch Deliberations on a Maritime Boundary East of Sebatik

2.51 In Chapter 4 of its Counter-Memorial (paragraphs 4.10-4.18), Malaysia deals extensively with internal discussions within the Dutch administration during the years 1922-1926 concerning the desirability of raising the issue of the delimitation of the territorial sea off the east coast of the island of Sebatik with the British Government. Indonesia was of course fully aware of these discussions, but has not previously dealt with them simply because they are totally irrelevant. By raising this matter, Malaysia is confusing the question of delimitation of the territorial sea (which is not the subject of the present dispute) with the question of title to territory.

2.52 Contrary to what Malaysia seems to imply, Indonesia has never suggested that the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary in the sea area east of Sebatik island. Rather, as submitted by Indonesia in its Memorial[51] and Counter-Memorial[52], the line must be considered an allocation line: land areas, including islands located to the north of 4° 10' N latitude were henceforth considered to be British, and those lying to the south were Dutch. That such land territory and islands generate a territorial sea which may require delimitation is another matter.

2.53 At the time of the conclusion of the 1891 Convention and the internal Dutch discussions during the 1920's, the only maritime jurisdictional zone that was generated by sovereignty over land was the territorial sea, extending to a maximum breadth of three nautical miles measured from the baseline of the coastal State. In cases of adjacent coastal States, and of opposite coastal States where the distance between their respective coasts was less than six miles, a delimitation of the respective territorial seas would, in principle, be called for. This was the case in the area east of Sebatik Island, where, as a result of the 1891 Convention, the land boundary terminated on the eastern shore of the island and thus the question arose how exactly the territorial sea boundary east of that point should be drawn. In addition, depending upon the course of this boundary, the delimitation with the territorial sea of the opposite mainland (Batoe Tinagat) might have come into play since Cowie Bay is less than six miles wide.

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[51] See, for example, IM, paras. 5.67, 6.1 and 9.13.

[52] See, for example, ICM, para. 5.10.

2.54 The internal Dutch discussions, as accurately described in Malaysia's Counter-Memorial, focused on the various options available in these particular circumstances. One option was to consider the 1891 Convention as also constituting offshore (i.e., up to three miles from the coast) a territorial sea boundary. The other option was to use the solution provided under the applicable rule of general international law – i.e., a line drawn perpendicular to the coast at the terminus of the land boundary[53]. The internal Dutch discussions reveal that differing views were expressed by various government officials on the preferred option, but the final view expressed in September 1926 by the Minister of Foreign Affairs (who has the final authority in such matters) was that the perpendicular line should apply and that it was not opportune to raise the matter with the British Government. And so it was decided. The matter was never raised with the British by the Dutch Government.

2.55 According to Malaysia, the discussions during 1922-1926 show "that the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Convention [54]. That conclusion is correct, and is entirely consistent with Indonesia's view that the 1891 Convention line, extending to the east of Sebatik Island, was an allocation line and *not* a maritime boundary. It should be stressed here again that any maritime boundary at the time could only have been a territorial sea boundary extending no more that three miles from the coast. But the 1891 line east of Sebatik had a different purpose. It represented a line separating territorial possessions, and because there were no insular possessions lying within three miles of the coast of Sebatik, the 1891 line (of attribution) was represented as a straight line along the 4° 10' N parallel of latitude. Consequently, there is nothing incompatible between the 1891 Convention line and the Dutch internal discussions as Malaysia tries in vain to imply.

2.56 It is also important to point out that the internal Dutch discussions of 1922-1926 were entirely restricted to the territorial sea boundary off Sebatik Island and did not involve the islands of Sipadan and Ligitan. This can easily be explained by the fact that in the cases of those two islands no territorial sea delimitation questions arose since they are located at distances of more than six miles from the nearest BNBC islands of Kapalai and Dinawan.

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[53] See the maps at MCM, pp. 76 and 77.

[54] *Ibid.*, para. 4.10.

2.57 What is als[illegible] interest is the fact that when, in 1968, Malaysia granted an offshore oil prospecting license to the Japanese company, Teiseki, the limits of Teiseki's concession just off the east coast of Sebatik followed the same perpendicular line that had been discussed by the Dutch in the 1920s. This can be seen from examining Map 2 which appears facing page 60 of this Reply. Thereafter, as Indonesia has explained in its Memorial[55], the southern limits of the Teiseki concession tracked the 4° 10' N line of latitude leaving a 30" buffer zone between those limits and the 4° 10' N line just as Indonesia had done with its own concessions.

2.58 Finally, it should be noted that the authorities of the Netherlands East Indies have, subsequent to the 1920's discussions, on occasions treated the 1891 Convention line as also constituting a territorial sea delimitation. This can be concluded from a map published in 1939 which shows the territorial sea off the coast of the sub-division of Tarakan[56]. The northern boundary of the territorial sea (with British North Borneo), east of Sebatik Island, follows the 1891 Convention line. This map is a so-called "Mining Legislation Map" (based on the Mining Act of the Netherlands East Indies), showing the areas reserved for mining and the concessions granted and applied for. The interesting aspect of this map is that it shows that, notwithstanding the 1920's internal discussions, the Dutch authorities during the 1930's had already begun to respect the line in practice (i.e., for the purpose of granting oil concessions). Indonesia will elaborate further on the significance of the treatment by both Parties of the 1891 Convention line in practice in the next chapter.

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[55] IM, paras. 6.11-6.27.

[56] Annex 28 to this Reply.

Section 5. Conclusion

2.59 It is apparent, for the reasons set out in this and the preceding Chapters (in amplification of those already given in Chapter V of Indonesia's Memorial and Chapter V of its Counter-Memorial), that:

(a) the parties' intention that the 4° 10' N line extended eastwards from Sebatik is substantiated by the Explanatory Memorandum Map, in which Great Britain acquiesced;

(b) the 1915 and 1928 Agreements do not contradict this conclusion as to the effect of the 1891 Convention;

(c) the internal Dutch territorial sea discussions are irrelevant as regards sovereignty over Sipadan and Ligitan.

2.60 Further, as will be shown in Chapter III, subsequent maps (starting with the Stanford map of 1894) specifically delineate a line at 4° 10' N, and such a line, which must have its roots *somewhere*, can only have been based on the 1891 Convention.

2.61 It follows that The Netherlands' (and now Indonesia's) sovereignty over Sipadan and Ligitan was acknowledged by the 1891 Convention, in particular its Article IV, which for the future rendered that title unchallengeable at least by Great Britain and its successors in title. Subsequent events have not displaced that treaty-based title.

CHAPTER III

THE SUBSEQUENT CONDUCT OF THE PARTIES CONFIRMING INDONESIA'S TITLE TO THE ISLANDS

3.1 In this Chapter, Indonesia will review the various elements of the conduct of the Parties and their colonial predecessors which confirms Indonesia's interpretation of the object and purpose of the 1891 Convention and hence Indonesia's title to Sipadan and Ligitan islands. Malaysia has preferred to give a very cursory treatment to these elements in its pleadings since they fundamentally contradict Malaysia's thesis of the case. But the evidence adduced by Indonesia cannot be so easily dismissed. The striking aspect of this conduct is that it reflects the *mutual* views of the Parties that the 4° 10' N line established by Article IV of the 1891 Convention extended to the east of the Island of Sebatik in conformity with the Dutch Explanatory Memorandum Map which was prepared in connection with the conclusion of the Convention.

Section 1. The Visit of the Dutch Naval Vessel, *Lynx*, to Sipadan and Ligitan in 1921

3.2 Throughout the early years of the 20th century, Dutch naval vessels were active in patrolling the areas east of Sebatik including around Sipadan and Ligitan. The Court will find a list of such voyages annexed to Indonesia's Counter-Memorial as well as a report of a visit of the HNLMS *Koetei* in September 1910 to the vicinity of Sipadan[1].

3.3 In November and December 1921, the HNLMS *Lynx*, a Dutch destroyer operating in tandem with a seaplane, made several visits to Sipadan and Ligitan in a clear display of Dutch sovereignty over both islands. The *Lynx's* mission was to patrol for pirates in territorial waters and insular possessions that belonged to The Netherlands. Throughout this voyage, which is discussed at paragraphs 6.3-6.5 of Indonesia's Memorial, the *Lynx* carefully avoided venturing within the three-mile territorial sea limit of British islands, such as Si Amil, which lay north of the 4° 10' N line. Because Sipadan and Ligitan both lay to the south of that line, the *Lynx* and the seaplane did visit them. Moreover, the activities of the *Lynx* were immediately reported to British authorities who raised no objection.

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[1] ICM, Vol. 2, Annexes 32 and 33.

3.4 In response to this important voyage, Malaysia's Counter-Memorial does no more than to assert, in a wholly self-serving fashion, that "as an incident it proves nothing" and that, "the *Lynx* incident certainly did not amount to a claim of sovereignty on Pulau Sipadan"[2].

3.5 Such an attempt at rebuttal is hardly convincing. The detailed report of the *Lynx's* visit to the region prepared by its commanding officer clearly demonstrates that the captain of the *Lynx* considered both Sipadan and Ligitan to fall under Dutch sovereignty. This was in stark contrast to the island of Si Amil, which, because it lay north of the 4° 10' N line *was deemed to be British*. It is useful to recall some of the salient comments contained in the commander's report which bear this conclusion out. The report itself may be found in Annex 120 of Indonesia's Memorial.

3.6 The report contains the following highly relevant entries:

(i) November 25, 1921: "HNLMS Lynx then weighed anchor at 18:00 hrs. and steamed away. After passing the lightship the lights were doused and we set sail for the island of Sipadan. We did not meet any proas during the night of 25 to 26 November and arrived at Sipadan at 0600 hrs. Sipadan lies approximately 20 miles from Si Amil. An armed sloop was sent ashore for information, but returned empty-handed".

(ii) "The plane was launched at 1000 hrs. and took off easily. The plane flew via Sipadan to the 3-mile limit off Si Amil".

(iii) "On Sunday, 27 November at 1830 hrs. I received your encoded wireless telegram sent on 25 November at 0940 hrs. which reads after decoding: 'With reference to your wireless telegram, English authorities will be warned without delay. Keep fleet under surveillance. As soon as they leave English territorial waters, seize them and take the Raja's prau to Tarakan for investigation of the incident responsible for Lynx's presence' [...]"

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[2] MCM, paras. 4.8-4.9.

(iv) 28 November 1921: "Lynx left the roads of Tarakan to sail to Si Amil to try to catch Raja Panglina Djumang of Sulu outside British territorial waters".

(v) "The plane made another flight to Si Amil that afternoon, where it discovered the pirate fleet of 40 proas under the leadership of Raja Panglina Djuwang. The plane landed outside the 3-mile limit".

(vi) 30 November 1921: "Weighed anchor at 2330 hrs., and steamed to Sipadan where no proas were seen. Sailed from there on 1 December to the 3-mile limit on the east side of Si Amil, where we found 40 proas fishing on the reef. It is gradually becoming clear that they have formed a settlement on Si Amil. Steamed away from Si Amil again in a southerly direction and sailed from Ligitan to South Sibetik."

(vii) "We launched the plane on 1 December at 0900 hrs., after which it made a tour to Ligitan heading to south Sibetik [...]"

(viii) "The plane then flew on from Ahus to the east of Mandul and from there directly to the island of Sipadan and the nearby Si Amil, where the fleet of 40 proas were still fishing. Received a wireless telegram at 1100 hrs through Tarakan from the Resident of Bandjermasin as follows: 'Regarding your signal yesterday, if pirates outside our territory and no threat to settlements expected, no further measures from Lynx needed'".

3.7 These reports make it abundantly clear that Sipadan and Ligitan, together with their territorial waters, were considered to be under Dutch sovereignty. Si Amil was not so considered, and hence the *Lynx* and its seaplane were always careful not to approach closer than three miles from this island. The British authorities were made aware of the *Lynx's* activities and never once protested or suggested that the *Lynx* was operating in British controlled areas. As such, the *Lynx* episode provides the clearest possible confirmation in physical terms – i.e., actual acts on the islands and within their territorial seas – that sovereignty over Sipadan and Ligitan vested with The Netherlands without any objection from Great Britain[3].

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[3] Malaysia's attempt to distinguish the *Lynx* visit to the islands with that of the U.S. vessel, the *Quiros*, in 1903 is totally unavailing (MCM, para. 4.9). As will be seen in Chapter VI, below, the voyage of the *Quiros* to the region did not result in any U.S. claim of sovereignty over the islands. To the contrary, U.S. vessels were expressly instructed not to make any such claims; see IM, Vol. 3, Annexes 106, 107 and 108.

Section 2. The Oil Concession History Supports Indonesia's Title

3.8 In its previous pleadings[4], Indonesia dealt fully with the fact that, in awarding oil concessions in the area prior to the emergence of the dispute in 1969, both Indonesia and Malaysia studiously respected the 4° 10′ N parallel as representing the limit of their respective jurisdictions. The Teiseki concessions (awarded by Malaysia) and the JAPEX concession (awarded by Indonesia) have been plotted, in red and green respectively, on a nautical chart of the area which appears opposite page 63 as Map 2.

3.9 As Indonesia showed, the Parties' mutual respect for the 1891 Convention line (each side's concessions stop 30 seconds – approximately half a mile – short of the 4° 10′ N parallel), is highly relevant[5]. Such mutual conduct brings to mind the practice of the parties in the *Tunisia/Libya* case where the existence of a *de facto* line separating the parties' respective offshore oil concessions constituted a highly relevant circumstance in the delimitation of their maritime boundary[6]. Although this case does not involve maritime delimitation, the Court's observation in the *Tunisia/Libya* case that, "it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such" is equally apposite in the present case[7]. In short, the Parties to this case respected the *precise line* established by the 1891 Convention in the granting of their offshore concessions. There is no other way to view the Parties' adoption of the 4° 10′ N line for the limit of their petroleum activities than as a reflection of the 1891 Convention.

3.10 In its Counter-Memorial[8], Malaysia quotes Article 2.1 of the JAPEX concession, in which "Contract Areas" are defined as "the continental shelves within the statutory mining territory of Indonesia[...]" and notes that Tarakan Island and Bunju Island are excluded from the Contract Area outlined in Exhibit A-2. However, Malaysia's fails to acknowledge that the preamble of the contract provides that Permina (a State enterprise) had "an exclusive 'Authority to Mine' for mineral oil and gas in and throughout the areas described in Exhibit A and B", and that although Tarakan and Bunju islands are excluded from the scope of Exhibit A (undoubtedly for contractual reasons), numerous other islands are not. Consequently, the contract clearly presupposed that the area described in Exhibit A fell within Indonesia's sovereignty.

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[4] IM, paras. 6.10-6.29; ICM, paras. 7.56-7.57.

[5] IM, para. 6.29.

[6] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18 at p. 84, paras. 117-118.

[7] *Ibid.*, p. 84, para. 118. Moreover, it is the Parties' *mutual* respect for the 1891 line which distinguishes the present case from the *Eritrea/Yemen* case where no such mutual conduct existed.

[8] MCM, para. 4.38.

3.11 In any event, since the concession area did not extend so far east as to encompass either of the islands in dispute, Malaysia's argument is irrelevant. What is important is that the northern boundary of the concession tracked the 4° 10' N parallel (albeit leaving a small 'buffer strip'). This practice reflected a clear understanding that the 1891 Convention line extended out to sea.

3.12 With regard to the Teiseki concessions, Malaysia is strikingly reticent in its Counter-Memorial. Malaysia simply notes that the Teiseki concessions did not include either of the islands in dispute (which is self-evident and fully supportive of Indonesia's case), and concludes that the concession is thus of "limited interest for these proceedings"[9].

3.13 Nothing could be further from the truth. The coordinates of the Teiseki concessions are of great interest since they clearly reflect an understanding on the part of Malaysia that the 1891 Convention line extended offshore eastward of Sipadan and Ligitan, and that Malaysia respected this line in awarding its concessions. Malaysia has provided no other explanation for why its concessions so faithfully took into account the 1891 Convention line and why it failed to object to Indonesia's own concessions which followed the same line.

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[9] *Ibid.*, para. 4.41.

3.14 It is also astonishing that Malaysia passes over in silence the official map produced by the Malaysian Ministry of Lands and Mines in 1968 depicting the limits of Malaysia's offshore oil concessions in the relevant area and Malaysia's international boundaries[10]. For the convenience of the Court, this map is reproduced opposite page 63 as Map 3[11].

3.15 With respect to the map, Indonesia would recall the following:

(i) The map was prepared by the Ministry of Lands and Mines of the Malaysian Government and thus represented the official view of the Malaysian Government as of 1968, one year before the dispute between the Parties arose;

(ii) The map contains no disclaimer as to boundaries;

(iii) Because petroleum operations are key issues for any government, the map must be viewed as reflecting the careful and considered views of the Malaysian Government on the question of concession limits and their implication for boundaries in the relevant area;

(iv) The map clearly shows the southern limits of the 1968 Teiseki concession extending east of the Island of Sebatik along, or very close to, the 4° 10' N line of latitude. In fact, these limits lay along the 4° 10' 30" N line of latitude;

(v) The map also specifically depicts "international boundaries", with the 4° 10' N line shown as such a boundary with Indonesia extending to a point well to the east of Sipadan and Ligitan;

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[10] At para. 5.21(g) of its Counter-Memorial, Malaysia states that this map is discussed at pp. 88-93 of the Malaysian Counter-Memorial. But the Court can search these pages of Malaysia's pleading in vain for any mention of this map. Quite simply, Malaysia has opted to ignore this key map which is so devastating to its case.

[11] The Court will also find this map facing page 106 of Indonesia's Memorial and attached as Annex 36 to Indonesia's Counter-Memorial.

(vi) Similarly, the map shows that to the east the Teiseki concession followed the precise limits of the 1930 boundary agreed between Great Britain and the United States. It is thus clear that Malaysia's intention was to grant a concession to Teiseki up to the limits of its jurisdiction and possessions. As noted above, this was the 4°-10' N line in the south;

(vii) There is no other explanation for the depiction of 4° 10' N line as Malaysia's "international boundary" on this official map other than the fact that the map reflected Malaysia's contemporaneous view that the boundary line separating each State's possessions did, as Indonesia has maintained, fall along the 4° 10' N parallel established by the 1891 Convention;

(viii) It follows that Malaysia's assertion that "The 1891 Boundary Convention was wholly irrelevant, and remained so until it became the focus of the Indonesian claim in 1969"[12] is flatly contradicted by Malaysia's own conduct.

3.16 The practice of the Parties in awarding concessions which respected the 4° 10' N parallel represents "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". This practice, Indonesia respectfully submits, should be taken into account by the Court as a key element in the case in accordance with Article 31, paragraph 3 (b) of the 1969 Vienna Convention on the Law of Treaties.

3.17 In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*[13] which Malaysia cites[14], the Court stressed the importance of such "subsequent practice" with reference to the International Law Commission's commentary on the relevant article of the draft Convention. The Court stated:

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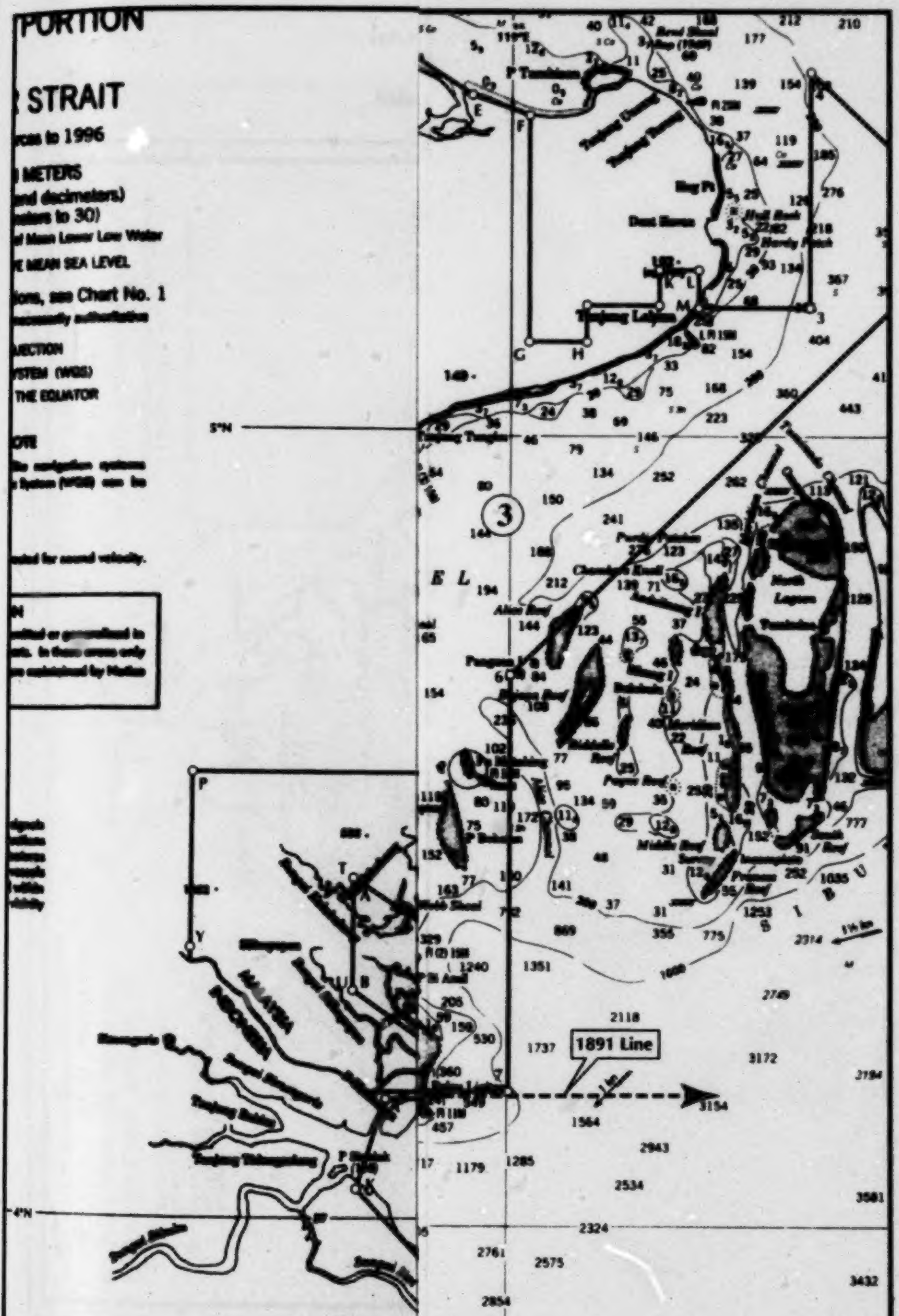
[12] MCM, para. 3.3.

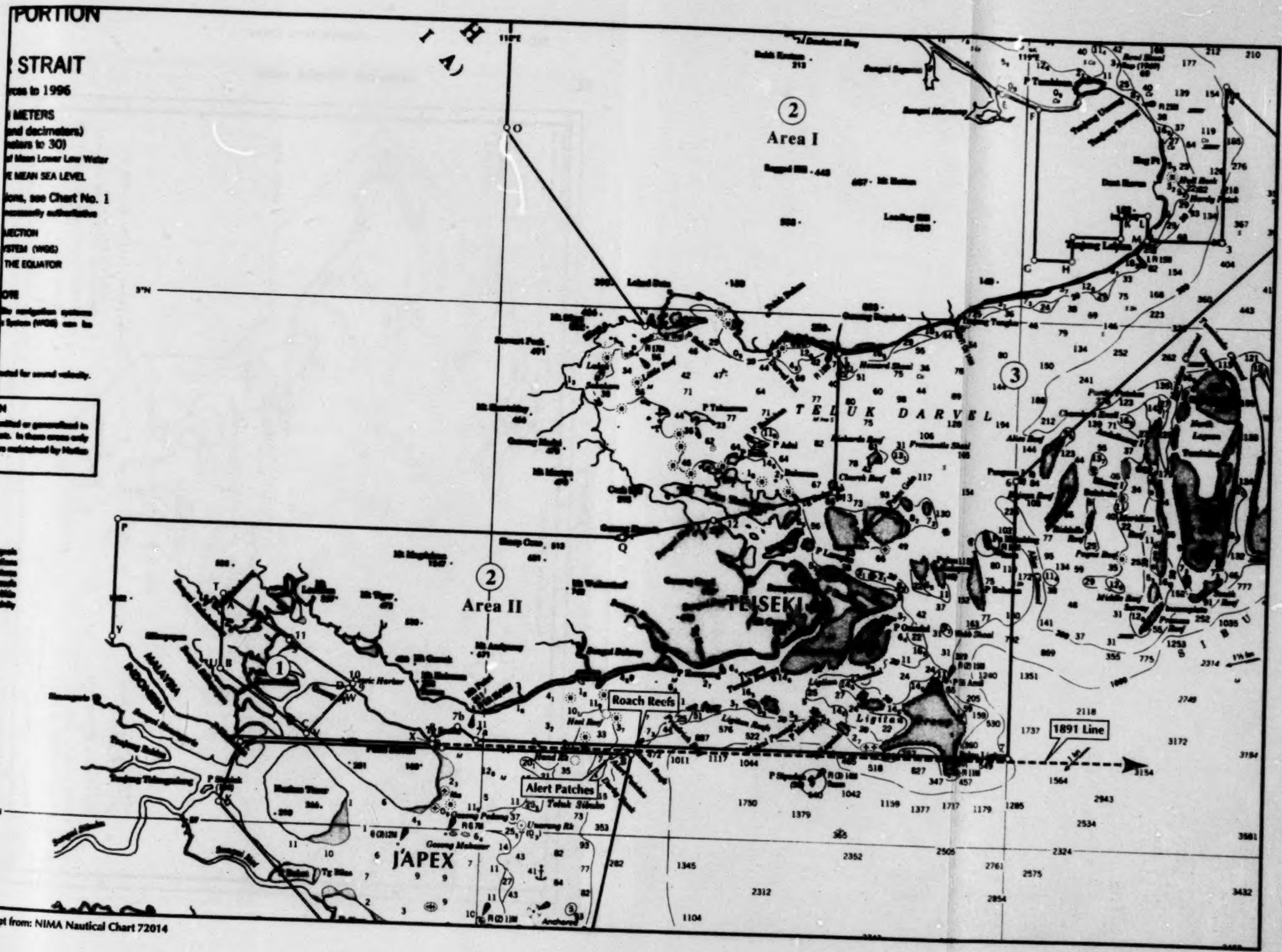
[13] *Judgment, 13 December 1999.*

[14] MCM, para. 4.48.


PORTION
STRAIT
ces to 1996
METERS
(and decimeters)
ters to 30)
of Mean Lower Low Water
E MEAN SEA LEVEL
tions, see Chart No. 1
ECTION
YSTEM (WGS)
THE EQUATOR
OTE
5°N
4°N
P Tambisan
Tanjung Labian
Dent Haven
Hull Rock
Hardy Patch
Alice Reef
Middle Reef
North Lagoon
3
E L
MALAYSIA
INDONESIA
1891 Line
A
B
E
F
G
H
K
L
M
P
T
U
Y
3154
2118
1737
1564
2943
2534
2324
2761
2575
2854
3172
3581
3432

Excerpt from: NIMA Nautical Chart 72014

Map 2

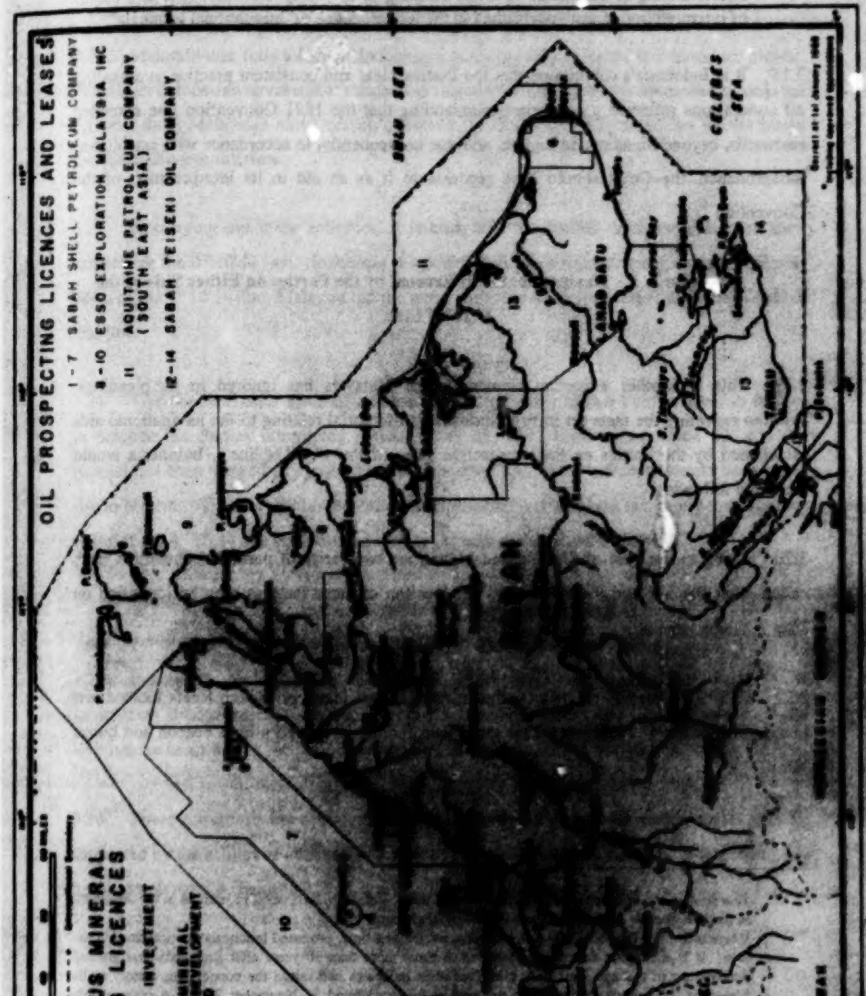

PORTION
STRAIT
1996
METERS
and decimeters)
to 30)
Mean Lower Low Water
MEAN SEA LEVEL
see Chart No. 1
THE EQUATOR
sound velocity.
Area I
Area II
TELUK DARVEL
TEISEKI
JAPEX
MALAYSIA
INDONESIA
Roach Reefs
Alert Patches
1891 Line
Ligitan
Sipadan
3°N
4°N
119°E
118°E
I
A)
H
O
P
Q
X
Y
①
②
③

ccerpt from: NIMA Nautical Chart 72014

Map 2

Sabah Mineral Resources

31


OIL PROSPECTING LICENCES AND LEASES
1 - 7 SABAH SHELL PETROLEUM COMPANY
8 - 10 ESSO EXPLORATION MALAYSIA INC
11 AQUITAINE PETROLEUM COMPANY (SOUTH EAST ASIA)
12-14 SABAH TEISEKI OIL COMPANY
METALLIFEROUS MINERAL PROSPECTING LICENCES
15 SORIAMONT INVESTMENT COMPANY
16 OVERSEAS MINERAL RESOURCES DEVELOPMENT COMPANY LTD
MILES
SULU SEA
CELEBES SEA
LAHAD DATU
TAWAU
SABAH
SARAWAK
BRUNEI
SOUTH CHINA SEA
Darvel Bay
1
7
9
10
11
13
14
Correct at 1st January 1968
*Including approved applications

Map 3

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals"[15].

3.18 It is Indonesia's submission that the Parties' clear and consistent practice in awarding oil concessions reflected a common understanding that the 1891 Convention line extended eastwards, beyond Sipadan and Ligitan, and that consequently, in accordance with established jurisprudence, the Court should have recourse to it as an aid in its interpretation of the Convention[16].

Section 3. Navigational Aids Erected by the Parties on Either Side of the 4° 10' N Line

3.19 This is another important element which Malaysia has ignored in its pleadings. Without repeating the facts set forth in Indonesia's Memorial relating to the navigational aids established by the Parties on their respective sides of the 4° 10' N line[17], Indonesia would recall the following.

3.20 Lying to the west of Sipadan and Ligitan are two series of partially submerged reefs called Alert Patches and Roach Reefs. The location of these features may be identified on Map 2, facing page 60.

3.21 In 1994, Malaysia erected a series of navigational buoys on Roach Reefs located just to the north of the 4° 10' N line. That same year, Indonesia erected a light beacon and buoys on Alert Patches which are located just to the south of the 4° 10' N line at latitude 4° 09' 33" N[18].

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[15] *Yearbook of the International Law Commission, 1966*, Vol. II, p. 241, para. 15, quoted in the Judgment in *Kasikili/Sedudu Island (Botswana/Namibia)*, *ibid.*, para. 49.

[16] It was only on 3 October 2000 that Malaysia, for the first time, protested Indonesia's concessions in the area. It is significant that this protest, which came more than 30 years after Indonesia first granted concessions in the area, was only submitted after Indonesia had raised the concessions history in its Memorial. Indonesia responded to this protest by letter dated 21 November 2000. A copy of this correspondence may be found in Annex 23.

[17] See IM, paras. 8.41-8.45.

3.22 Malaysia was fully aware of Indonesia's activities in this regard but raised no protest. Indeed, an Indonesian naval report attached as Annex 181 to Indonesia's Memorial records the fact that three Malaysian naval vessels observed the Indonesian authorities set up the buoys but did nothing to interfere.

3.23 In carrying out these activities, it is clear that the Parties were scrupulous in their respect for the 4° 10' N line. Indonesia respected Malaysia's right to erect navigational aids north of the 4° 10' N line; Malaysia did the same with respect to Indonesia's activities south of that line.

3.24 This conduct, once again of a mutual nature, provides further confirmation as to how in practice the Parties interpreted Article IV of the 1891 Convention. Had the 4° 10' N parallel not been viewed as constituting an allocation line, these incidents would have given rise to protests. The fact that no protests were forthcoming is eloquent testimony to the agreed status of the 4° 10' N line as extending well to the east of the Island of Sebatik.

Section 4. Indonesian Naval Patrols and Fishing Activities

3.25 Indonesia's understanding that the 4° 10' N parallel represented the limit to its jurisdiction is confirmed by the activities of the Indonesian navy and of fishermen from the Kalimantan coast during the period from Indonesia's independence until 1969.

3.26 These activities were set out at paragraphs 6.6 to 6.9 of Indonesia's Memorial, and are supported by the affidavits attached to the Memorial as Annexes D, F, G and H (regarding the naval patrols) and Annexes I, J, K, L and M (regarding fishing activities).

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[18] For details, the Court is referred to IM, Vol. 4, Annexes 179 and 181.

3.27 As regards the affidavits concerning the Indonesian naval patrols, Malaysia can say nothing more than that such patrols were "quite an exceptional practice" and that they "seemed uneventful"[19]. As rebuttal, these comments are unsubstantiated and entirely inadequate. The fact, uncomfortable as it is for Malaysia, remains: the Indonesian navy did patrol the areas encompassing Sipadan and Ligitan after independence, and the patrols' "uneventful" nature (i.e., that they were not protested by Malaysia) merely supports Indonesia's entitlement to patrol in these areas.

3.28 Malaysia's comments regarding the traditional practice of Indonesian fishermen to fish around the islands of Sipadan and Ligitan, where they would take refuge should the need arise, are similarly brief and dismissive[20]. The fact of the matter remains that fishermen from the Kalimantan coast have traditionally fished on and around the islands, a fact that Indonesia has supported with affidavit evidence and which Malaysia has failed to rebut. This thus constitutes further evidence that Indonesia considered itself as possessing sovereignty over the islands consistent with the terms of the 1891 Convention.

Section 5. The Map Evidence Supports Indonesia's Position as to Sovereignty

3.29 The Parties have presented a significant body of cartography in these proceedings and both have argued that the preponderance of the map evidence supports their respective positions[21].

3.30 Despite the amount of cartographical evidence produced and relied upon by Malaysia, it is curious to note the defensive shift of position adopted in Malaysia's Counter-Memorial where Malaysia attempts to downplay the relevance of maps in the determination of boundary disputes[22]. Indonesia can only surmise that Malaysia realises that the maps, particularly the relevant British and Malaysian cartography, support Indonesia's case.

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[19] MCM, para. 4.46.

[20] *Ibid.*

[21] See, for example, IM, paras. 6.77-6.79; ICM, para. 7.93 and Map Annex; MCM, paras. 5.37-5.39.

[22] MCM, paras. 5.31-5.39.

3.31 In this section, Indonesia will review the cartographic evidence in the case which so clearly shows the existence of a line extending along the 4° 10' N parallel east of the Island of Sebatik, thus confirming that Great Britain and The Netherlands (subsequently, Malaysia and Indonesia) understood that the 4° 10' N line established by the 1891 Convention separated their respective possessions off the east coast of Borneo. Moreover, the record includes an impressive number of official maps – published both prior and subsequent to the emergence of the dispute in 1969 – which represent admissions against interest by Malaysia[23].

3.32 Malaysia's Counter-Memorial attempts to distinguish two categories of cartographical evidence: (a) maps annexed to boundary treaties or demarcation agreements; and (b) maps not agreed by the Parties, and which do not form part of internationally binding instruments relating to a boundary[24]. Malaysia asserts that maps in the first category "are of great importance and may be decisive", while maps in the second category "are not to be treated in any way as if they were documents of title"[25].

3.33 While it is undisputed that the probative value of maps in boundary disputes varies depending on a number of factors, Indonesia submits that the classification adopted by Malaysia is overly simplistic and fails to take into account the fact that maps produced in connection with the conclusion of a boundary treaty – the 1891 Dutch Explanatory Memorandum Map being a prime example – can be "decisive". Moreover, Malaysia also fails to acknowledge that other maps produced by one of the Parties, or its colonial predecessor, which show a boundary inconsistent with the position now espoused by that Party can also be highly relevant.

3.34 An objective appraisal of the cartographic evidence which is relevant in the present dispute leads to the identification of a number of important maps which can be distinguished as follows:

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[23] In Section 3C of Chapter VII and in the Map Annex attached to this Reply, Indonesia will analyse the maps submitted by Malaysia with its Counter-Memorial.

[24] MCM, para. 5.32.

[25] *Ibid.*

(i) maps which represent the parties' intentions with regard to the boundary line expressed during the course of the negotiations leading up to the conclusion of the 1891 Convention;

(ii) maps reflecting the contemporaneous view of the parties' interpretation of the terms of the Convention and its implications;

(iii) maps which confirm the parties' interpretation of the line resulting from the Convention in the years following its conclusion[26]; and

(iv) maps which can be viewed as admissions against interest, i.e., which "do not assert the sovereignty of the country which the Government has caused them to be issued"[27].

3.35 Maps falling within the first category have already been addressed by Indonesia in Chapter I. Indonesia has shown that a number of such maps were produced and exchanged by the signatories to the Convention. These maps show that The Netherlands and Great Britain both intended the boundary line to extend out to sea beyond the east coast of the Island of Sebatik[28].

3.36 With respect to maps constituting the contemporaneous view of the parties as to the object and intent of the 1891 Convention, Indonesia has shown that the Dutch Explanatory Memorandum Map is particularly relevant. Suffice it to recall that the map was presented to the Dutch Parliament in connection with The Netherlands' ratification of the Convention and it was available to, and examined at the highest levels of, the British Government. Indeed, it was Sir Horace Rumbold who, even before instruments of ratification were exchanged, described the map to the Foreign Office as "showing the boundary line as agreed upon under the late Convention"[29]. The map so described drew no protest or dissent from the British Government.

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[26] See IM, para. 6.36.

[27] *Island of Palmas, 2 R.I.A.A.* (4 April 1928), p. 829 at p. 852.

[28] See paras. 1.30-1.31, above; see also ICM, paras. 5.70-5.75.

3.37 In Indonesia's submission, the Explanatory Memorandum Map – seen also in the context of the proposals exchanged between the parties prior to the conclusion of the 1891 Convention – must be regarded as a mutually agreed depiction of the terms of the treaty.

3.38 As for the third category of maps, both Indonesia and Malaysia have submitted an extensive selection of official maps published after the 1891 Convention was concluded which show the international boundary extending across Sebatik Island and then continuing seawards along the 4° 10' N parallel[30]. Of particular significance is the fact that a large number of British (particularly those prepared by Stanford for the BNBC) and Malaysian maps depict the 4° 10' N line in this manner. The only possible conclusion is that these maps reflected the parties' views as to the impact of the 1891 Convention, including the fact that the boundary line did not stop at the east coast of the Island of Sebatik as Malaysia contends. Malaysia has provided no alternative explanation for why its own maps, and those of Stanford, repeatedly depicted the 4° 10' N line in this manner if its own interpretation of the Convention is correct.

3.39 Maps published following the conclusion of the 1891 Convention reflecting such official intent include, in the period immediately following the signature of the Convention, the following:

(i) Stanford's map of Borneo dated 1894.

(ii) Stanford's map of Borneo dated 1903.

(iii) Stanford's map of Borneo dated 1904.

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[29] See paras. 2.30-2.31, above.

[30] Indonesia would also draw the Court's attention to a commercially produced Dutch map prepared in 1894, shortly after the conclusion of the 1891 Convention, which likewise shows the 4° 10' N Convention line continuing eastwards from Sebatik. A copy is at Annex 27.

3.40 The 1903 Stanford map was included in Indonesia's Memorial facing page 118. The other two maps (as well as an 1887 Stanford's map) have been inserted in the following Chapter where they are discussed in more detail. Their relevance for purposes of this case rests on the following:

- The 1887 map, which pre-dated the 1891 Convention, does not show any boundary line extending out to sea from the Borneo mainland. This reflected the fact that there was no agreed boundary at that time.
- Subsequent Stanford's maps issued after the Convention entered into force consistently show the southern limit of the BNBC's provinces as lying along the 4° 10′ N parallel of latitude extending out to sea from the Island of Sebatik.
- This line did not just appear out of nothing. The only possible explanation for its appearance on the maps is that it reflected Stanford's understanding – and hence the BNBC's understanding as well since Stanford acted as the BNBC's official cartographer – of the terms and effect of the 1891 Convention.
- Islands lying south of the 4° 10′ N line depicted on the map must have been deemed to be Dutch. The line arose as a result of the 1891 Convention between The Netherlands and Great Britain. The United States, as will be seen in Chapter VI, had no interests to the south of the line. In fact, the Stanford maps all show the limit of U.S. possessions in the area as lying in the vicinity of Sibutu Island which is well to the northeast of the 4° 10′ N line.

3.41 The same 4° 10′ N line appears with regularity on Malaysia's own maps of the area. While some of these maps contain a disclaimer as to the boundaries depicted, others do not. What is significant is the repeated appearance of the line on the maps. Once again, there is no explanation for the line other than the fact that it reflected the 1891 Convention. In this respect, the following maps merit particular attention.

(i) *Pulau Sebatik*, Ministry of Defence of the United Kingdom (for the Directorate of National Mapping, Malaysia), 1964[31]. Malaysia still has not explained why the boundary line extends due east of the Island of Sebatik along the 4° 10' N parallel if not based on the 1891 Convention.

(ii) *Tawau*, Ministry of Defence of the United Kingdom (for the Directorate of National Mapping, Malaysia), 1965[32]. The map again clearly depicts the 4° 10' N boundary extending out to sea.

(iii) *Malaysia, Singapura, Brunei: Pemerentahan* (Political map of Malaysia Singapore & Brunei), Directorate of National Mapping of Malaysia, 1966[33]. The boundary, as to which there is no disclaimer, clearly follows the 4° 10' N parallel.

(iv) *Malaysia Timor Sabah*, Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1966[34]. While the map contains a gap in the 4° 10' N line, it also shows that line extending east of Sebatik. Malaysia has failed to explain why the 4° 10' N line was extended so far out to sea if not in accordance with the 1891 Convention.

(v) *Malaysia Timor Sabah*, Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1967[35]. The same comment applies as for the map discussed under (iv) above.

(vi) *Oil Prospecting Licences and Leases*, Malaysian Ministry of Lands and Mines, 1968[36]. This highly relevant map shows the "international boundary" very clearly as the 4° 10' N line extending to the east of the disputed islands. There is no disclaimer on the map. Malaysia has not even attempted to explain why

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[31] IM, Map Atlas, Map No. 11.
[32] *Ibid.*, Map No. 13.
[33] ICM, Map Annex, Map A.1.
[34] IM, Map Atlas, Map No. 12.
[35] *Ibid.*, Map No. 14.
[36] *Ibid.*, Map No. 16.

an official Ministry of the Malaysian Government depicted the boundary in this fashion if not as a reflection of the 1891 Convention.

(vii) *Continental Shelf Boundaries Between Indonesia and the Republic of Malaysia,* Annexure "A" to Agreement, Jabatanarah Pemetaan Negara, Malaysia, No. 30, 1969[37]. Once again, the 4° 10' N line appears on this map.

(viii) *Malaysia Timor Sabah,* Malaysian Department of Land and Surveys, Sabah, 1964, printed by the Malaysian Directorate of National Mapping, 1972[38]. This map is similar to the maps discussed under (iv) and (v) above despite the fact that it was printed after the 1969 negotiations between the Parties had taken place.

(ix) *Negeri Sabah, Population and Housing Census, Map Showing Distribution of Population,* 1970, Malaysian Department of Statistics, 19[illegible][39]. This map contains a disclaimer as to boundaries, but still depicts the 4° 10' N line extending to the east of Sipadan and Ligitan.

3.42 As noted above, it is significant that, even after the dispute arose in 1969, Malaysia continued to publish maps showing a line extending seaward from the island of Sebatik along the 4° 10' N parallel of latitude. The endorsement of this line in practice was also corroborated by the activities of Malaysia and Indonesia in licensing petroleum activities in the area before 1969 and in erecting navigational aids on Roach Reefs and Alert Patches in 1994[40].

3.43 The striking fact about this substantial body of cartographic material is the consistent appearance, particularly on the BNBC (Stanford) and Malaysian official maps, of a line extending offshore from the east coast of the island of Sebatik. While Malaysia has failed to give any reason for the line's presence on these maps, the only possible explanation is that the

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[37] *Ibid.*, Map No. 17.
[38] *Ibid.*, Map No. 18; MM, Map Atlas, Map No. 21.
[39] IM, Map Atlas, Map No. 20.
[40] IM, paras. 8.41-8.45; see also Sections 2 and 3, above.

4° 10′ N line reflected the understanding of all relevant parties that the 1891 Convention line continued beyond the east coast of Sebatik. The repeated depiction of this line on official Malaysian cartography is a clear admission against Malaysia's interest and represents compelling evidence that Malaysia itself viewed the line of separation between it and Indonesia as following the 4° 10′ N parallel beyond Sebatik Island such that Sipadan and Ligitan fell on the Indonesia side of the line.

PART 2

THE ABSENCE OF ANY MALAYSIAN TITLE TO THE ISLANDS

CHAPTER IV

THE RE-ORIENTATION OF MALAYSIA'S POSITION

4.1 In its Memorial, Malaysia advanced a confused and inherently contradictory position with respect to the chain of title by which it allegedly acquired sovereignty over the islands of Sipadan and Ligitan. Malaysia's principal position was expressed in the very first paragraph of its submission on the question of title under the rubric "The Core of Malaysia's Case". That position was as follows:

> "Those [*i.e.*, Malaysia's] predecessors in title were, from 1878, the British North Borneo Company (hereinafter "the Company"), which in 1889 came under the protection of Great Britain (hereinafter "Britain") and then Britain itself, after it had changed the status of North Borneo from a protectorate to a colony in 1946"[1].

4.2 The Court will note that there was no suggestion of any Spanish or United States chain of title in this proposition. Title was alleged to have vested in the BNBC in 1878 by virtue of the grant from the Sultan of Sulu to Messrs. Dent and Overbeck. Since this grant only related to islands situated within nine miles of the north Borneo coast – and Malaysia admits that Sipadan and Ligitan lie more than nine miles from the coast – Malaysia tried to buttress its arguments by asserting that the 1903 Confirmation of Cession from the Sultan of Sulu to the BNBC, which Malaysia admits was not viewed as legally valid by the British Government, covered Sipadan and Ligitan even though that instrument did not refer to these two islands, and the islands that were named in the Confirmation all lay to the north of the 4° 10' N latitude[2].

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[1] MM, para. 2.1.

[2] Indonesia demonstrated that the 1903 Confirmation, whatever its legal effect, did not relate to Sipadan and Ligitan at paras. 4.27-4.37 of its Counter-Memorial.

4.3 Malaysia also advanced a second theory in its Memorial regarding its alleged chain of title. According to this second theory:

> "the islands of Ligitan and Sipadan have during the last two centuries been under the sovereignty, first, of the Sultan of Sulu, then of Spain, then of the United States, then of Great Britain and now of Malaysia"[3].

4.4 Clearly, as Indonesia pointed out in its Counter-Memorial, both of Malaysia's arguments cannot be correct. If title to the islands is said to have vested in the BNBC after 1878, then it cannot logically be maintained that sovereignty rested simultaneously with Spain or, after the 1900 U.S.-Spain Treaty, with the United States[4]. In point of fact, Indonesia has shown in its Counter-Memorial that both chains of title are fatally flawed. Nonetheless, the contradiction in Malaysia's Memorial was glaring and served to undermine the overall credibility of Malaysia's case as a whole.

4.5 In Malaysia's Counter-Memorial the position has changed. Although Malaysia does not expressly abandon its contention that the BNBC acquired title to the disputed islands in 1878, it is clear that Malaysia appreciates the difficulty of its position and thus now argues that it is the chain of title passing through Spain, thence to the United States, and thence to Great Britain (subsequently Malaysia) upon which its case principally rests.

4.6 This change of position is evidenced by the following statement which appears at paragraph 2.2 of Malaysia's Counter-Memorial:

> "Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930"[5].

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[3] MM, para. 4.2.

[4] See ICM, paras. 2.10-2.11, 3.5 and 4.1-4.3.

[5] Elsewhere in its Counter-Memorial, specifically at paras. 3.18 and 3.29, Malaysia confirms that the key element of its claim is the 1930 Anglo-U.S. Convention in which, it is alleged, the United States "ceded to Britain" the islands of Sipadan and Ligitan.

4.7 There is no room in this formulation for any co-existing British claim of sovereignty over the islands. In 1878, the islands were said to be Spanish. In 1900, they were said to have been transferred to the United States. And in 1930, they were claimed to have been ceded to Great Britain.

4.8 The only vestige of Malaysia's assertion of title passing through the BNBC is in Chapter 3 of its Counter-Memorial[6]. There, Malaysia makes a half-hearted attempt to keep the disavowed 1903 Confirmation of Cession in play by asserting that the Confirmation "was considered as covering Ligitan and Sipadan"[7].

4.9 As Indonesia demonstrated in its Memorial and Counter-Memorial, the 1903 Confirmation did nothing of the sort[8]. Malaysia accuses Indonesia of "question begging", but the situation is straightforward.

(i) It is a fact that the 1903 Confirmation was viewed as legally invalid by the British Government.

(ii) It is a fact that the Confirmation did not name either Sipadan or Ligitan when it would have been perfectly possible to do so since other islands of a similar small size were so named[9].

(iii) It is a fact that all of the islands listed in the Confirmation lay to the *north* of the 4° 10′ N latitude which had been agreed as separating Dutch and British possessions in the 1891 Convention.

(iv) And it is a fact that the Stanford Company, which acted as the BNBC's official cartographer, published a map just four months after the Confirmation was issued which depicted the offshore limits of the BNBC's territorial possessions as including all of the islands named in the 1903 Confirmation, but which expressly adopted the 4° 10' N line of latitude as the southern limit of those possessions thus excluding Sipadan and Ligitan, both of which lie to the south of this line.

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[6] MCM, paras. 3.15 and 3.16.

[7] *Ibid.*, para. 3.16.

[8] IM, paras. 7.15-7.16; ICM, paras. 4.27-4.33.

[9] Malaysia asserts that the reason why Sipadan and Ligitan were not listed in the 1903 Confirmation was because the Confirmation only named inhabited islands (MCM, para. 3.16). Suffice it to note that Malaysia has failed to introduce any evidence to support this assertion.

4.10 Stanford's maps of British North Borneo during the relevant period are of considerable interest. While reference has been made to the map prepared by Stanford in August 1903 – a reproduction of which may be found opposite page 54 of Indonesia's Counter-Memorial and as Map No. 9 in Indonesia's Map Atlas – there are a number of additional maps which show with great clarity that the BNBC recognised the 1891 Convention boundary as extending out to sea along the 4° 10' N parallel of latitude. These maps have been taken from successive editions of Stanford's London Atlas of Universal Geography.

4.11 Map 4, following this page, is a reproduction of a map taken from Stanford's London Atlas of Universal Geography published in 1887 – in other words, four years before the 1891 Convention was concluded[10]. On this map, the southern limits of British North Borneo are shown as extending roughly along the Sibuku River south of the Island of Sebatik. This was in conformity with the BNBC's views at the time of the limits of its possessions. Significantly, the southern boundary is not extended out to sea, although there is a curved red line in the Sulu Sea which ostensibly depicts the limits of what were thought to be Spanish possessions in the area. Contrary to Malaysia's current assertions, the map shows that Spain was not viewed as having any territorial pretensions lying south or west of Sibutu Island and its immediate dependencies.

4.12 In the 1894 edition of the atlas, Stanford published another map of the same region. It has been reproduced following Map 4 as Map 5[11]. Since this map post-dated the 1891 Convention, it depicted the boundary between Dutch and British possessions agreed in that Convention. What is significant is that the southern limits of British North Borneo can now be seen to extend out to sea from the Island of Sebatik along the 4° 10' N line of latitude to a

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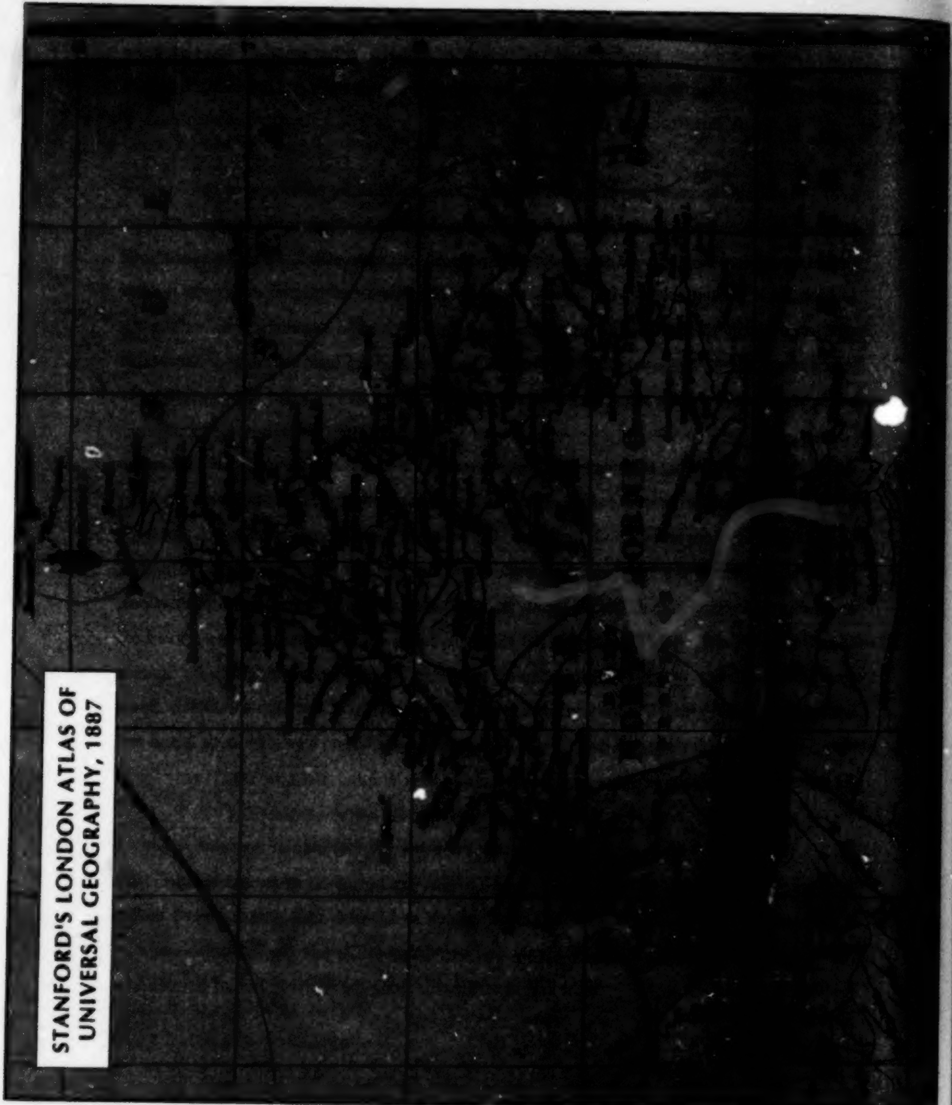
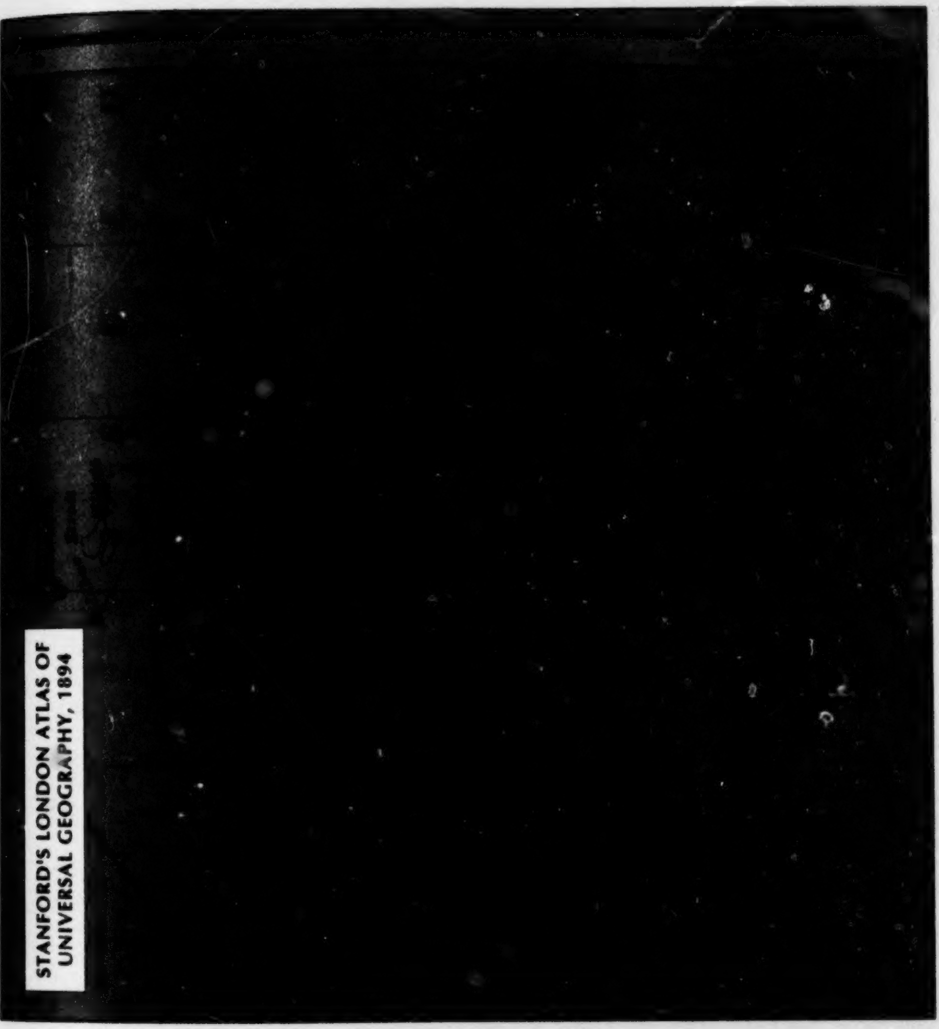
[10] The full map and atlas front-sheet are at Annex 24.

[11] The full map and atlas front-sheet are at Annex 25.



STANFORD'S LONDON ATLAS OF UNIVERSAL GEOGRAPHY, 1887



STANFORD'S LONDON ATLAS OF UNIVERSAL GEOGRAPHY, 1894

Map 5

point well to the east of Sipadan and Ligitan. There can be no other explanation for this southern limit than the fact that it reflected the territorial boundary between British North Borneo and Dutch possessions agreed upon in the 1891 Convention. British possessions were clearly seen to be limited to areas lying to the north of 4° 10′ N latitude.

4.13 The next map, displayed overleaf as Map 6, is a similar Stanford map published in the 1904 edition – i.e., one year after the 1903 Stanford map which Indonesia produced in its earlier pleadings[12]. For all intents and purposes, it is the same as the 1903 map. The southern limits of British North Borneo still track the 4° 10′ N line of latitude. Indeed, on the 1903 Stanford map, the red lines extending out to sea are specifically identified as the boundaries of the BNBC provinces.

4.14 In its Counter-Memorial, Malaysia concedes that Sipadan is outside of the boundary of British North Borneo as shown on the 1903 Stanford map. Paradoxically, however, Malaysia claims that "the map shows Ligitan as within the administrative boundary of Elphinstone Province"[13]. This is simply not true. Both the 1903 and the 1904 Stanford maps label "Ligitan Reef" in such a way as to straddle the 4° 10′ N line. But Ligitan Island is too small to appear independently on the map. Nonetheless, it must be recalled that Malaysia itself has identified Ligitan as lying on the 4° 09′ 48″ N parallel of latitude – in other words, *south* of the 4° 10′ N line[14]. Since the dashed red line appearing on the map as the southern limit of British North Borneo extends eastwards from Sebatik along what can only be the 4° 10′ N parallel, Ligitan must lie to the south of that line.

4.15 With respect to Sipadan, Malaysia argues that it is not shown as Dutch. But what else could it be? Sipadan was not deemed to be part of British North Borneo because it lay outside the red line boundary which, as on the mainland, constituted the boundary between Dutch and British possessions. Nor was it deemed to form part of Spanish or, subsequently, U.S. possessions in the region. The 1887, 1894, 1903 and 1904 Stanford maps all label Sibutu Island and its immediate dependencies as belonging either to Spain or, post-1900, to the

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[12] The full 1904 map and atlas front-sheet are at Annex 26.

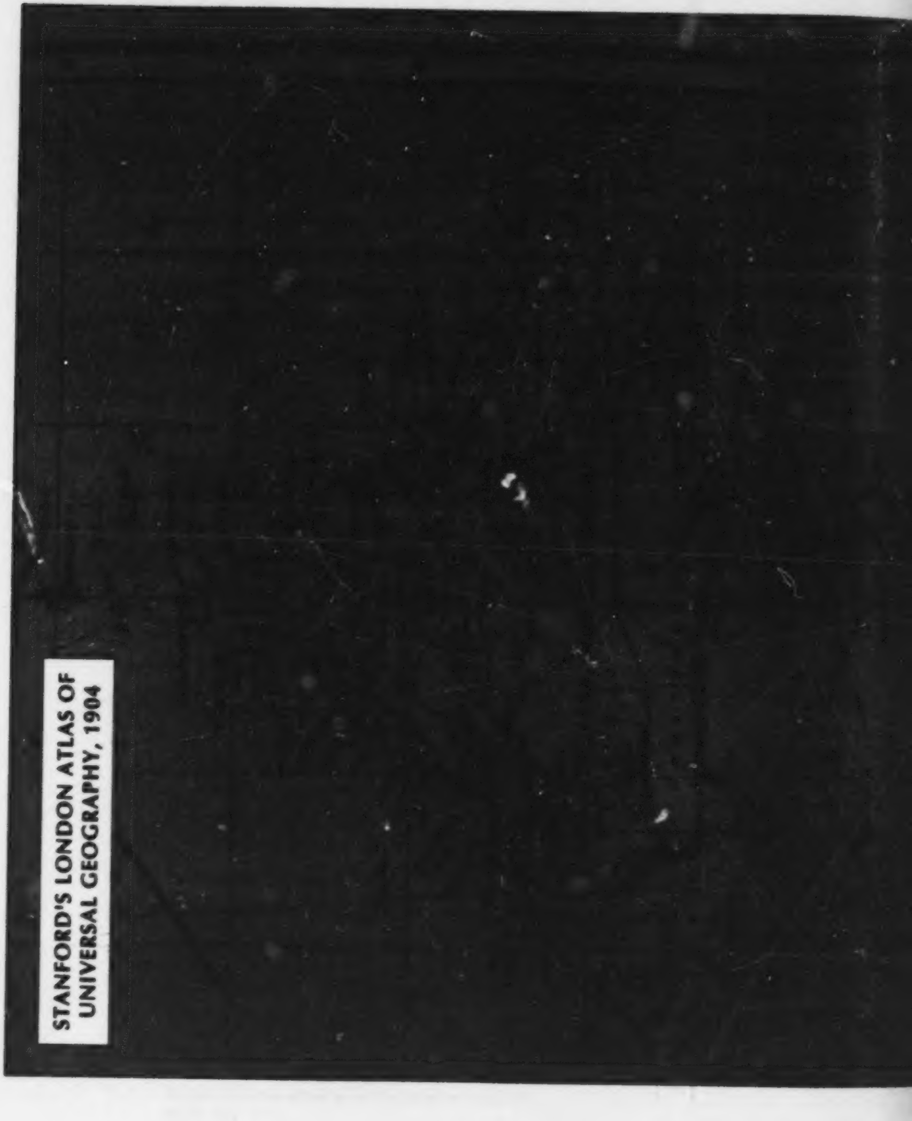
[13] MCM, para. 3.15.

[14] *Ibid.*, para. 1.4. These same co-ordinates for Ligitan are recorded at para. 3.9 of Malaysia's Memorial.

United States. But Sipadan and Ligitan are not similarly labelled. Since they lay to the south of the line agreed in the 1891 Convention depicted on the map, the only conclusion is that they were deemed to be Dutch just as mainland territories south of the line were also Dutch.

4.16 Given the re-orientation of Malaysia's case away from a chain of title passing from the BNBC, to Britain and thence to Malaysia, it is unnecessary at this stage to comment further on Malaysia's assertions in this respect. Malaysia's principal claim now appears to centre on the allegation that Spain originally possessed title to the islands in question and that this title was inherited by the United States in 1900 and then ceded to Great Britain in 1930. Indonesia will expose the fallacies in this line of argument in Chapter VI.

4.17 Malaysia also continues to assert that it administered both Sipadan and Ligitan notwithstanding the existence of a so-called Spanish or U.S. title over them. These contentions which, if anything, are given greater prominence in Malaysia's Counter-Memorial due to the weakness of Malaysia's arguments based on a treaty title, are dealt with in Chapter VII. Suffice it to note here that any such administration – and there was none on Sipadan and Ligitan at least prior to the 1917 Turtle Ordinance – could not displace a legal title lying elsewhere.


STANFORD'S LONDON ATLAS OF
UNIVERSAL GEOGRAPHY, 1904

CHAPTER V

NON-EXISTENCE OR UNCERTAINTY OF PRE-COLONIAL TITLES

5.1 In its Counter-Memorial, Malaysia revisits the pre-1891 situation at length, especially when it claims to describe the "Background to the Boundary Convention of 20 June 1891"[1] and when it describes "The extent of the Sultanate of Sulu before 1878"[2]. The purpose of this chapter is to show that the extent of the possessions of the Sultanate of Sulu south of the 4° 10′ N parallel was, to say the least, uncertain and that, in any case, Malaysia has not provided the slightest evidence of any presence of Sulu on the disputed islands, and that this excludes the existence of any pre-colonial title and, at the same time, the existence of the "chain of title" alleged by Malaysia.

5.2 In any event, as Indonesia has shown above[3], the pre-1891 situation is not decisive in the present case: whatever the territorial situation might have been at the time, it was clarified and set up on a new basis by the 1891 Convention which put "an end to all difficulties in the future"[4]. Therefore, it is only to add surplus legal arguments and to avoid leaving any aspect of this case, however artificial, in any uncertainty that Indonesia will respond briefly to Malaysia's arguments.

5.3 In fact, it follows from Malaysia's own description of the territorial situation in this region that it was characterised by numerous uncertainties. In particular:

- uncertainties concerning the extension to the south of the Sultan of Sulu's possessions, in respect of which Malaysia gives a very misleading description (Section 1);
- uncertainties, acknowledged by Indonesia, concerning the exact extension to the north of the Sultan of Boeloengan's possessions, even though there is no

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[1] MCM, paras. 2.4-2.20.
[2] *Ibid.*, paras. 3.7-3.14.
[3] See paras. 1.23, 1.29(a) and 2.8-2.11.
[4] See the Dutch Explanatory Memorandum, IM, Vol. 3, Annex 77.

doubt that, at the relevant time (1891), the possessions of the Sultan extended at least to Batoe Tinagat and the River Tawau (Section 2);

- uncertainties concerning the nature of the relations which may have existed between the local rulers and the inhabited islands in the region, which Malaysia fails to mention, and, *a fortiori*, the legal status of the disputed islands at that time, which has been entirely fabricated by Malaysia (Section 3).

All these uncertainties only go to confirm Indonesia's submission that to attempt to draw any consequences of a legal nature from the pre-1891 situation is useless for the settlement of this dispute (Section 4).

Section 1. The Malaysian Errors and Approximations Concerning the Southern Extension of the Sultan of Sulu's Possessions

5.4 Malaysia asserts correctly that "[t]he authority of the Sultan of Sulu on the coastal territory of northeast Borneo in the middle of the 19th century is not in dispute between the Parties to the present proceedings"[5]. However, this begs the question: it is not a matter of knowing whether the Sultan of Sulu exercised rights over possessions on the north-east coast of Borneo, which is certain, but rather of knowing the location of the southern boundary of these possessions and how the question was in fact resolved in regions where uncertainties existed.

5.5 Malaysia does not respond to this question clearly. It simply asserts that "the Sultan [of Sulu] claimed allegiance over a significant portion of the north and east coasts of Borneo, at least down to the Sibuko River"[6], that the northern boundaries of the Sultanate of Boeloengan were uncertain (which is probably true, but does not entail the consequences drawn by Malaysia – as to which, see Section 2, below), and that "[t]he cape of Batu Tinagat [...] was the extreme eastern claim of The Netherlands on the east coast of Borneo"[7]. All this is repeated a number of times[8] and Malaysia draws the following consequences from these assertions:

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[5] MCM, para. 2.4.
[6] *Ibid.*, para. 3.2.
[7] *Ibid.*, para. 2.13.

(i) "All the territory east of that point was considered British or Spanish territory by the Dutch authorities themselves"[9]; and

(ii) the islands "were incontrovertibly part of the social and administrative system of Darvel Bay and surrounding islands"[10], which fell under the authority of the Sultan of Sulu, to whom, it allegedly follows, Ligitan and Sipadan belonged.

5.6 The only argument put forward by Malaysia to justify its assertion that the sovereignty (or suzerainty) of the Sultan of Sulu extended "at least down to the Sibuko river" seems to be based on the grant by the Sultan of Sulu to Messrs. Dent and Overbeck of 22 January 1878 to whom he granted all his rights to and powers over the tributary territories and lands "to the southward thereof, bordering on Darvel Bay, as far as the Sibuco River [...]"[11].

5.7 As interpreted by Malaysia[12], the grant is based upon an erroneous understanding of the local geography: the Sibuko (or Sibuco) River does not flow into Darvel Bay but south of Nanoekhan into Sibuko Bay, and it is probable that in reality the 1878 grant was intended to refer to not "Sibuco River" but "Subakun River", which actually flows into Darvel Bay, as Count de Bylandt noted in his letter to Earl Granville of 1 December 1882:

> "La notice que j'ai l'honneur de remettre ci-près à votre Excellence contient un ensemble de faits qui permettent de considérer comme fort probable que la rivière désignée dans les Concessions sous le nom de 'Siboehoe' est située à l'est de Batoe Tinagat et par conséquent en dehors du territoire néerlandais"[13].

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[8] See, for example, *ibid.*, paras. 2.18, 2.20(b), 3.1(a), 3.8 and 3.9.

[9] *Ibid.*, para. 2.20(b).

[10] *Ibid.*, para. 3.3; see also, para. 3.5.

[11] See IM, Vol. 2, Annex 17.

[12] As, it must be said, Great Britain had earlier: see the Proceedings of the Joint Commission, First Meeting, 16 July 1889 (IM, Vol. 3, Annex 57), in which the British Government maintained that "the Sibuco River mentioned in the Dent and Overbeck Grants was that situated in about 4° 4' north latitude, and was not the 'Sibuco' incorrectly marked on the Admiralty Chart about that date as being near Tawao River before any survey had been made".

[13] IM, Vol. 2, Annex 31, quoted in MCM, para. 2.14.

5.8 Moreover, the British Government itself seemed at this time to harbour certain doubts as to the exact location of this river, which allowed Count de Bylandt to conclude in this letter that this uncertainty:

> "[...] est trop grande pour que le fait qu'elle est mentionnée comme limite des Concessions, puisse infirmer les données positives à l'égard de la frontière Néerlandaise telle qu'en premier lieu le contrat avec Boelongan la définit"[14].

5.9 Furthermore, as said above, The Netherlands immediately protested this claim. Hence, in his letter to Earl Granville, Count de Bylandt, while maintaining very strongly the Dutch view that the border was fixed, and should remain to be fixed, at Batoe Tinagat, indicated in diplomatic but firm terms that the river "Siboehoe" was located east of Batoe Tinagat, and consequently outside Dutch territory[15]. In a despatch to Count de Bylandt dated 22 December 1888 which was communicated to Lord Salisbury on 3 January of that year, Mr. Hartsen, the Dutch Minister of Foreign Affairs, reiterated that "les droits de souveraineté des Pays-Bas [sur Batoe Tinagat ...] ne sauraient être contestés"[16], and in a further despatch dated 19 March 1889 (communicated to Lord Salisbury on 27 March) he insisted that "il est constaté que la Rivière Siboekoe se jette dans la mer près de l'Île de Nanokong" and that the Netherlands Government "n'a pas eu la moindre incertitude sur la situation de cette rivière"[17].

5.10 It is in this context that Great Britain was notified of the Contract renewed in 1878 between The Netherlands and the Sultan of Boeloengan, to which Malaysia refers in paragraph 2.9 of its Counter-Memorial. In this respect, two points should be noted:

- Firstly, even if the 1850 contract was not notified to Great Britain, the same cannot be said of the 1878 contract, which was notified to Great Britain on 17 January 1880[18]. Thus, as from that date the British Government was informed of the Dutch claims, and could not claim that there had been a breach of the 1824 Treaty;

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[14] *Ibid.*
[15] *Ibid.*
[16] IM, Vol. 2, Annex 37.
[17] *Ibid.*, Annex 47; see also IM, Vol. 3, Annex 58.
[18] In this respect, see IM, paras. 3.22 and 4.63 and Sir E. Hertslet's Further Memorandum on the Disputed Boundary dated 9 January 1889 at IM, Vol. 2, Annex 38.

- Second, Great Britain did not protest this notification, which must be interpreted as an acquiescence, *a fortiori* since on several occasions the Netherlands Government re-stated this to the British Government, which did not respond for several years – see, for example, Mr. Hartsen's despatch to Count de Bylandt of 22 December 1888: "le Gouvernement de Sa Majesté britannique n'a jamais fait le moindre obstacle ni la moindre observation quant au contenu du Contrat Politique du 2 juin, 1878, avec le Sultan de Boeloengan"[19].

5.11 Moreover, whilst Malaysia in its Memorial[20] revisits at length the alleged acts of administration of Sulu over Semporna and the Bajau population of Dinawan (which are scarcely more than sporadic demonstrations of allegiance for pure expediency, which as such cannot "prevail against a legal title"[21]), it has not, either in its Memorial or in its Counter-Memorial, provided the slightest *prima facie* evidence of any Sulu presence south or west of Batoe Tinagat, and has not even gone so far as to allege any such presence[22]. To the contrary, in its Memorial Malaysia reinforces Indonesia's thesis, as it appears in Annex 88 to Malaysia's Memorial (the *British North Borneo Herald* article dated 2 February 1903), that Dinawan is the southernmost island of the "Bajau country"; this phrase designating, according to Malaysia, not the area where the Bajau Laut were present, but the area in which Malaysia attributes influence to the Sultan of Sulu over these populations and not sovereignty[23]. The article states in relevant part that: "The [Sulu] Bajau country may be said to lie within a square formed by Latitude 4° and 5° N and Longitudes 118° and 119° E [...]. The most easterly and southerly boundary of the Bajau country is the island of Danawan". This island is north of Batoe Tinagat and north of Ligitan and Sipadan. Indonesia has previously shown that the presence of those Bajau Laut was not limited to this area[24]. It would thus follow from Malaysia's own reasoning that the influence of the Sultan of Sulu was limited to the Bajau

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[19] IM, Vol. 2, Annex 37.

[20] See MM, paras. 3.7, 5.7 *et seq.* and 6.5 *et seq.*

[21] See *Dubai/Sharjah Border, Award, 19 October 1981*, ILR 91, p. 543 at p. 650, para 210; ICM, paras. 3.41 *et seq.*

[22] See also Section 3, below.

[23] See ICM, para. 3.57.

[24] *Ibid.*, paras. 3.26 *et seq.*

Laut who were living in this more northern area, which amounts to an acknowledgement that the Sultan of Sulu had no influence outside that area.

5.12 A preliminary conclusion can thus be drawn: the presence of Sulu, however virtual or theoretical it may have been in the Semporna peninsula, in Dinawan or in Si Amil, never extended south of that area. Malaysia acknowledges this implicitly in stating, "[t]he east coast settlements of the BNBC [which it describes as being the successor to the Sultan of Sulu] – including Sandakan, Lahad Datu, Semporna and *after 1892*, Tawao – became the new focus of the trade and administration of the local Bajaus"[25]. It is only after the 1891 Convention was concluded that the BNBC was able to move into the southern areas and establish a long-term presence at Tawau, at the mouth of the river of that name. Prior to that date neither the BNBC nor Sulu had been established there.

5.13 Had the situation been different and the Sultanate of Sulu actually been established south of Batoe Tinagat, or, simply stated, had the Sultanate of Sulu had any claims over that area, no consequences could be drawn from this from a legal point of view: the only consequence would have been that the claims of Sulu (and Great Britain) on the one hand, and of Boeloengan (and The Netherlands) on the other, would have overlapped, and Indonesia has shown in its Memorial[26] that such a phenomenon frequently occurred in that part of the world at that time. Moreover, Malaysia acknowledges this elsewhere in its pleadings: "[T]he overlapping claims in the south were bound to create conflict"[27]. Furthermore, after having referred to Milner's book, *Kerajaan* (1982 – no page indicated) in which it is explained that "[t]erritorial borders [of Malay States] were often unknown [...]. The actual location of the Malay state, in fact, appears to have been of little importance"[28], Professor V.J.H. Houben, in his short study attached to Malaysia's Counter-Memorial as Appendix 1, explained that "Dutch and British claims, based on their contracts with respectively, Boeloengan and Sulu, overlapped"[29]. Overlaps certainly do not create good legal title – but they do give rise to uncertainties, which need to be resolved if conflict is to be avoided.

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[25] MCM, para. 3.2, p. 53. Emphasis added.

[26] IM, paras. 4.20-4.45.

[27] See MCM, para. 2.12; see also para. 2.4.

[28] *Ibid.*, Appendix 1, para. 4.4.

[29] *Ibid.*, para. 5.2.

Section 2. The Erroneous Consequences Drawn by Malaysia on the Probable Northern Boundary of the Sultanate of Boeloengan

5.14 Indonesia does not dispute the fact that as from 1850 The Netherlands admitted that the territory of Boeloengan did not extend beyond the cape of Batoe Tinagat[30], and Count de Bylandt confirmed this position in his letters of 1882 and 1888, referred to above, although the Sultan of Boeloengan had in certain circumstances affirmed that his influence extended further to the north[31]. However, Malaysia presents the consequences of this admission in a very deceptive way: on the one hand, it devotes itself to attempting to cast doubts on the reality of this extension; on the other, it draws erroneous conclusions from this situation.

5.15 Despite the doubts stated by Malaysia[32], it is indisputable that, while the 1891 Convention was being negotiated, The Netherlands were actually established in Batoe Tinagat. This follows from the chronology presented in the Malaysian Counter-Memorial:

- at the outset, The Netherlands had provisionally set at 3° 20' N the outer boundary of the parts of Borneo over which it exercised influence[33];

- in 1849, The Netherlands made no reference to a northern boundary[34];

- in 1850, The Netherlands concluded a contract with the Sultan of Boeloengan, recognising that the boundaries of the Sultanate extended "at sea" up to a "cape named Batoe Tinagat, as well as the Tawau River"[35];

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[30] See the Contract between the Government of the Netherlands East Indies and the Sultan of Boeloengan of 12 November 1850, IM, Vol. 2, Annex 13.

[31] See the "Notes concerning the North-East Coast of Borneo" by H. von Dewall published in *Tijdschrift voor Indische Taal-, Land- en Volkenkunde*, Deel IV, Niewe Serie, Deel I, 1855, which state at p. 423 (in translation): "There was a sentiment in 1849 to fix this point [the most northern point of the boundary of the Dutch possessions on the eastern coast of Borneo] at 5° 40' (the bay of Sandakan), or indeed at 6° 25' (bay of Paitan or the river Soegoet)", at Annex 1 of this Reply.

[32] See, for example, MCM, paras. 2.4 and 2.12.

[33] Resolution of the Governor-General of The Netherlands East Indies of 28 February 1846, IM, Vol. 2, Annex 10, quoted at MCM, para. 2.6.

[34] See IM, Vol. 2, Annex 12.

[35] *Ibid.*, Annex 13, quoted at MCM, para. 2.8.

- throughout the negotiations leading up to the 1891 Convention, The Netherlands stuck to this boundary[36].

5.16 This development must be considered in its context. In this region, the middle of the 19th century was a period of steady and intensive European expansion. Consequently, it is not surprising that the Dutch promptly modified their territorial claims in order to thwart those of the Spanish and British who were becoming a threat, and at the same time to clarify their relations with the Sultan of Boeloengan. Furthermore, there is nothing surprising about the fact that the Dutch Government admitted before Parliament that their claims were "not in reality indisputable"[37] (which does not mean that they were unsustainable). It was undoubtedly the case that the respective claims of all the local rulers were "not in reality indisputable"[38], and once again, these Dutch admissions must be considered in their proper context: the Dutch Government was trying to justify to Parliament their withdrawal from their northerly positions to the 4° 10' N parallel. A perfectly understandable and politically natural way of doing so was to explain that those northerly claims were, in any event, rather weak or "imaginary" and that they had not really given up anything of substance.

5.17 In any event, and despite this political prudence, at the time the British-Dutch rivalry intensified in the area the Dutch were actually present in Batoe Tinagat and Tawau. This appears very clearly in a document which Malaysia would have difficulty contesting, since it is the report drafted by Professor V. J. H. Houben upon Malaysia's request, entitled "The Regional History of Northeast Borneo in the Nineteenth Century (with special reference to Bulungan)", reproduced as an appendix to the Malaysian Counter-Memorial. The author, who insists that "abstention", was "a leading principle of Dutch policy in the region"[39], strongly qualifies what he says: "In this respect it is very important to note that there were two clearly marked periods of Dutch activity on Borneo, one in the mid-1840s and another from 1877 onwards. Both episodes of Dutch action, which were in clear deviation from the official policy of abstention concerning the Outer Islands, were essentially reactions against what was perceived as an acute English threat"[40]. Moreover, Professor Houben acknowledges that a

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[36] See IM, paras. 5.1-5.23, and IM, Vol. 2, Annexes 27, 29 and 40.

[37] *Ibid.*, Vol. 3, Annex 84; see MCM, para. 2.16.

[38] See IM, paras. 4.20 *et seq.* and ICM, paras. 3.81-3.83.

[39] MCM, Appendix 1, para. 2.2; see also para. 3.2.

[40] *Ibid.*, para. 3.2; see also paras. 3.3-3.5.

Dutch controller was stationed at Muara Tawau from 1882 to 1889[41]. However, he fails to mention other significant facts such as:

- the Dutch naval patrols in the area[42];
- in particular, the voyage of HNLMS *Admiraal van Kinsbergen*, the log book of which refers to cruising around Sipadan and landing armed sloops on the island of Mabul (which lies further to the north)[43];
- a letter from Sir Rutherford Alcock to Sir Julian Pauncefote dated 11 January 1884 referring to Dutch men-of-war cruising "north of the boundary they themselves claim, viz., Batu Tinagat"[44]. As a glance at a map of the area shows, this must be a reference to the waters off the south coast of the Semporna peninsula, well to the north of Sipadan and Ligitan, and the same area as that in which the *Admiraal van Kinsbergen* was cruising; and
- the fact that the British Admiralty pilots state that, in 1890, the only information the British Admiralty had on Sebatik Island "is from the Dutch chart"[45], which shows, at least, that the Dutch were active in the region, whilst the British had to rely on Dutch information (see also the advertisement to the 1902 edition of that same document: "many scientific expeditions have been sent *by the Dutch Government*"[46]).

5.18 Moreover, it is interesting to note that Professor Houben shows that contemporaneous with the renewed activity of the Dutch, the Sultan of Sulu's influence in the region weakened (which had been exercised over "Bulungan's trade", not over Boeloegan's territory)[47] and the

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[41] *Ibid.*, para. 5.2; see also IM, paras. 4.64 and 5.4 and MCM, para. 2.12.

[42] See, for example, ICM, paras. 3.67-3.68.

[43] See *ibid.*, Vol. 2, Annex 12.

[44] Annex 2 to this Reply.

[45] MCM, Vol. 2, Annex 1.

[46] Annex 4 to this Reply. Emphasis added.

[47] See MCM, Appendix 1, para. 6.3, see also para. 7.iii.

"Sulu's hegemony declined"[48]. He also shows that during that period, "Bulungan itself started to play a central role in the slave trade of the region"[49] like the Semporna Bajau Laut[50], which shows that there were at least relations between them.

5.19 Malaysia gives few concrete and precise arguments to illustrate its assertions according to which Boeloengan did not control the northern area claimed by The Netherlands. The few details it gives in this respect are nothing but misleading approximations. Namely:

- The administrators of the BNBC did not venture so far south until 1891, whereas the Dutch were already present in Tawau during the years preceding the signature of the 1891 Convention, and, as admitted by Malaysia, it was only after 1892 that the BNBC established a settlement in Tawau[51];
- In no way can The Netherlands be said to have accepted in 1891 "the effect of the 1878 grant in relation to the northern half of Sebatik itself and areas inland"[52]. They did – which is completely different – accept a compromise which in no way implied any "acceptance" of the interpretation of the 1878 grant then given by Great Britain and fully incompatible with the wording used[53];
- it is difficult to see how the Dutch map of 1913, to which Malaysia refers at the end of paragraph 3.9 of its Counter-Memorial, could in any way be interpreted to show the situation existing prior to 1891 (or even 1878) that it is supposed to illustrate.

5.20 Moreover, Malaysia ignores a number of important elements. Some have been explained in the Indonesian Memorial[54] and Counter-Memorial[55]. Others deserve to be mentioned here. For example:

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[48] *Ibid.*, para. 6.3.

[49] *Ibid.*, para. 6.4.

[50] *Ibid.*, paras. 6.3 and 7.iii.

[51] *Ibid.*, para. 3.2.

[52] *Ibid.*, para. 3.9.

[53] See para. 5.9, above.

[54] IM, paras. 4.47-4.71.

[55] ICM, paras. 3.66-3.73 and 5.42.

- as early as 1850 the Dutch Minister of Finance announced before the Second Chamber of the Dutch Parliament that: "les dernières enquêtes ont appris que des Chefs Boelongans sont établis sur les territoires riverains de quelques petites rivières jusqu'au 4° 20' de latitude nord"[56];

- again, in 1879, the Dutch Minister of the Colonies in a parliamentary reply concerning the 1878 grant, indicated:

> "As far as the Sulu concession is concerned it is not quite certain whether the contracting parties were well acquainted with the precise frontier-line of the Netherlands territory on the east coast of Borneo. With a view to preventing possible misapprehensions, orders have been issued for the Netherlands flag to be hoisted on the border (at the Batoo Tinagat Rock, situated at the mouth of the Tinagat River in 4° 19" north latitude and 117° 51" east longitude, according to the last survey) to be placed for the present under the protection of a cruizer, whilst the Sultan of Boloengau has been requested to maintain a Representative at this point on his side of the frontier-line in question"[57].

- similarly, during the Anglo-Dutch negotiations in July 1889, Count de Bylandt remarked that:

> "a distinct proof of the fact that Tidoeng did not belong to Sulu was the fact that the population paid taxes to the Sultan of Boelongan; that they had often claimed protection from the Netherland authorities; and had themselves denied that they had any relations with Sulu"[58].

- furthermore, it is most interesting to note that, in 1895, four years after the Dutch-British Convention establishing a new boundary, it was reported in the *British North Borneo Herald* that:

> "The British North Borneo Government drew the attention of the Governor-General to the fact that the authorities of Bulongan, a Netherlands India vassal State, had been levying taxes on territory in the neighbourhood, which had

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[56] Quoted in Memorandum on the Dutch Frontier on the North-east Coast of Borneo by Sir E. Hertslet, 20 June 1882, IM, Vol. 2, Annex 28.

[57] MM, Vol. 3, Annex 40, quoted at MM, para. 7.6.

[58] IM, Vol. 3, Annex 57.

> been ceded by the Dutch Government to the British North Borneo Company in 1892. The Netherlands India Government warned the Sultan of Bulongan against doing anything of the kind in future, upon which the Sultan apologised to the authorities at Sandakan for his officials' transgression"[59].

5.21 This last incident is extremely revealing. It shows that:

- the British North Borneo press clearly considered that the territory north of the 4° 10' N parallel had been ceded by the Dutch to the British;

- the Sultan of Boeloengan was still active in this region long after the cession – which would also indicate that his officials had been present there before; and

- Boeloengan was not as deprived of governmental structures as Professor Houben tends to show in his note[60].

5.22 Several things can be learned from the situation existing prior to the conclusion of the 1891 Convention, namely:

- the Sultan of Sulu had never exerted any physical presence south of Darvel Bay; any presence that he had was only manifested as a form of commercial influence, which in any event was receding;

- despite its so-called policy of abstention, The Netherlands had strengthened their presence in the region;

- whatever the real or supposed borders of the Sultanate of Boeloengan were (the territorial borders of the Malay and Borneo States were unclear, as Professor Houben insists in his report), the Dutch were nonetheless established at Batoe Tinagat and Tawau.

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[59] ICM, Vol. 2, Annex 13.

[60] MCM, Appendix 1, paras. 4.1-4.9.

5.23 The conclusion Malaysia draws from this situation (i.e., that which is described in the Malaysian Counter-Memorial and in its Appendix, which forms almost the only source for the above description) is very questionable: namely that it follows that all territory located "east of Batu Tinagat" belongs to Malaysia. To draw such a conclusion would be reckless. It is true that this expression has been used *once* (in French: "à l'est de Batoe Tinagat") by Count de Bylandt in 1882[61], and possibly twice if the reference by the Dutch delegation to the Joint Commission of 19 July 1889 is also counted[62], but it certainly does not justify the *leitmotiv* which it is accorded in the Malaysian Counter-Memorial[63], the only purpose of which appears to be to give the impression that The Netherlands had given up all claims and all presence east of that point.

5.24 Of course, it is nothing of the sort. The use of the expression "à l'est de Batoe Tinagat" must be interpreted in the light of its context, i.e., of a discussion relating entirely to the "north-south": the aim for Count de Bylandt had been to clarify the *southern* limit of the concession granted by the Sultan of Sulu, and at the same time the *northern* limit of the Dutch expansion. This is confirmed by the statement of Count de Bylandt cited by Malaysia at paragraph 2.14 of its Counter-Memorial:

> "Le Gouvernement du Roi a cru devoir prendre comme limites extrêmes à l'ouest: Tandjong Datoe, et à l'est: Batoe Tinagat, étant donné que les droits de souveraineté des Pays-Bas sur ces deux points extrêmes de l'Ile de Bornéo ne sauraient être contestés"[64].

If the Sultan and The Netherlands had wanted to draw a line from east to west, the purpose would have been to establish clearly the limit between the territories located to the *north and south* of this line. And it is clear that the area located *north* of this line was that which The Netherlands considered to fall beyond Dutch territory.

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[61] See paras. 5.7 and 5.9, above

[62] MCM, para. 2.15.

[63] See paras. 5.5 *et seq.* above.

[64] IM, Vol. 2, Annex 37.

Section 3. The Malaysian Errors and Extrapolations Concerning the Ownership of the Disputed Islands before 1891

5.25 The islands of Ligitan and Sipadan certainly lie "to the east" of Batoe Tinagat; but they are also – and particularly for the purposes of the present case – *to the south* of the northern limit of the territory claimed by The Netherlands in the name of the Sultan of Boeloengan. This territory was effectively occupied by them just as the Anglo-Dutch rivalry which preceded the conclusion of the 1891 Convention was at its height. They also lie *to the south* of the boundary formed by the parallel 4° 10' N, as fixed by the 1891 Convention. Moreover, at that time the Dutch clearly considered that Mabul Island, which is to the *north* of the two disputed islands *and to the east of Batoe Tinagat*, belonged to the Sultan of Boeloengan, from whom they had obtained their title[65].

5.26 Malaysia, which appears to attach importance only to the "east-west" dimension, despite the fact that the territorial dispute between Great Britain and The Netherlands over Borneo was clearly "north-south" based, goes to great lengths to try to substantiate the theory that the disputed islands belonged to the Sultanate of Sulu. These arguments are as follows:

(a) there was no indication "that islands so far at sea as Sipadan and Ligitan were concerned by that boundary delimitation"[66]; the only relevant islands "were the islands of Tarakan, Nunukan and Sebatik and the 'small islands belonging thereto' or 'adjacent' to those islands"[67];

(b) the Sultan of Boeloengan, who was concerned to preserve the rights of his subjects to collect forest products between Broershoek and Batoe Tinagat, "at no time asked for the right to collect products of the sea on islands east of Batu Tinagat"[68];

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[65] ICM, para. 3.67.

[66] MCM, para. 2.10; see also para. 3.9.

[67] *Ibid.*, para. 2.20(c).

[68] *Ibid.*, para. 2.18.

(c) the Bajau Laut "principally based on Danawan, the headmen of which had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan", "were considered as a Sulu population" and were not "under the authority of Bulungan and The Netherlands"[69];

(d) in fact, islands "such as Sipadan and Ligitan [...] were administered by the BNBC and were occupied and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC"[70];

(e) they "were part of the social system of the local people"[71], that is, apparently, "the social and administrative system of Darvel Bay and surrounding islands"[72];

(f) Boeloengan was "a small land-based sultanate [which had] no claim to effective control over the islands off the Semporna peninsula [*sic*]"[73]. Even if the islands did not form part of the "Sulu archipelago", these "two small islands in Darvel Bay [*sic*]" belonged to "the dominions of Sulu"[74].

5.27 The confusions in terminology in these last two citations are certainly not fortuitous. The same may be said of the systematic use of the expression "east of Batu Tinagat"[75] a tactic designed to create an erroneous impression in the mind of the reader that the islands in question belonged to much larger entities whose legal status they automatically followed. In speaking of "islands off the Semporna peninsula" or "off Semporna"[76], or "in Darvel Bay" or of the "system of Darvel Bay", or of the "social system of the local people", or, slightly more subtly, of the "Ligitan group"[77] or "the group of islands associated with Ligitan reef"[78], the object is to deceive the reader into believing that, since we are concerned with a single entity, all of its "components" must have the same status: since Semporna clearly belongs to

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[69] *Ibid.*, para. 2.16; see also para. 3.2.
[70] *Ibid.*, para. 3.1(c); see also paras. 3.2 and 3.9.
[71] *Ibid.*, para. 3.5.
[72] *Ibid.*, para. 3.3.
[73] *Ibid.*, para. 3.9.
[74] *Ibid.*, paras. 3.12 and 3.14.
[75] See paras. 5.5 *et seq.*, and 5.23-5.24, above.
[76] MCM, paras. 3.3 and 3.8.
[77] *Ibid.*, paras. 1.4, 3.5, 3.15, 3.26 and 3.28.
[78] *Ibid.*, para. 2.40.

Malaysia, the same must go for "the islands off Semporna"; since the authority of the Sultan of Boeloengan without doubt did not stretch to Darvel Bay, neither did it stretch to the "islands in Darvel Bay", etc.

5.28 Beyond these tactics, the problem is that Malaysia's assertions do not correspond to legal reality, or even, for the most part, to geographical reality (except as concerns the appurtenance of Ligitan to "Ligitan reef"): neither Ligitan nor Sipadan are situated in Darvel Bay; Sipadan does not belong to "Ligitan reef" or "group"; and if the two islands are indeed "off Semporna", they are not "adjacent" and do not "belong to it" in the sense Malaysia gives to these expressions[79]. Furthermore, the islands display the characteristics of being situated to the south of, on the one hand, Batoe Tinagat[80] and, on the other, the 4° 10' N parallel – contrasting in both cases to Si Amil and Dinawan, to which Malaysia assimilates the disputed islands with disconcerting ease[81].

5.29 Moreover, another striking characteristic of Malaysia's style of argument is that *at no time* has Malaysia provided the *slightest* proof of any Sulu presence *whatsoever* on either Ligitan or Sipadan before 1891:

- In apparently referring to Ligitan and Sipadan (the reasoning is convoluted), Malaysia writes that "in fact these islands were administered by the BNBC and used by Bajaus who transferred their allegiance from the Sultan of Sulu to the BNBC"[82]. This is pure speculation. Furthermore, the references made in the Counter-Memorial to the Memorial ("paras. 5.19, 5.28, 5.31-5.34, 6.5-6.8 & documents there referred to") are deceptive: this supposed proof generally does not concern the islands in dispute but at best relates to Dinawan or Si Amil and in any event *is all post-1891*, as Indonesia established in its Counter-Memorial[83] where it was also shown that the Bajau in no way transferred their allegiance from the Sultan of Sulu to the BNBC[84]: the very idea of allegiance was completely alien to them.

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[79] *Ibid.*, paras. 2.10-2.11.
[80] See para. 5.24, above.
[81] See also ICM, para. 7.18.
[82] MCM, para. 3.1(c).
[83] ICM, paras. 7.16 *et seq.*
[84] *Ibid.*, paras. 3.23-3.73.

- Similarly, when Malaysia affirms that the Bajau headmen who were established on Dinawan "had the right (confirmed by the Sultan of Sulu) to collect turtle eggs on Sipadan"[85], it offers no pre-1891 evidence to support this assertion, and provides nothing that does not already appear in its Memorial (see, for example, paragraph 6.9 of Malaysia's Memorial, where Malaysia alleges that "the ownership of the rights was at all material times vested in local Bajaus who acknowledged the authority of the Company. They alone were entitled to collect the eggs". However, no evidence of this assertion is referred to in the subsequent paragraphs). In any event, as Indonesia has shown, the collection of turtle eggs is no proof of the exercise of territorial sovereignty[86].

5.30 Moreover, even though, in contrast to its Memorial, Malaysia's Counter-Memorial does not stress the Bajau Laut's supposed control over the disputed islands, it nevertheless seriously ignores the nomadic and "non-territory oriented" character of the Bajau. As Clifford Sather puts it:

> "Without a territorial base of their own, they were perceived by their neighbours as living outside, and so only tangentially connected to, the system of personal and economic relations in Sulu. Reflecting this status of social and political exclusion, sea-nomadic communities were identified by outsiders by pejorative terms, such as *pala'au* or *luwa'an*, meaning, literally, 'that which is spat or vomited out'"[87].

5.31 In any case, it is far from true that the Bajau Laut had exclusive links, whatever their nature, with Sulu: "In addition to Sulu, [the 'Dinawan Community's] leadership maintained political connections with Bulungan"[88]. And in 1855 the German ethnographer and Dutch official, Hermann von Dewall, noted that the "Bajaus" in Pulau Panjang (a small island near Tanjung Batu, off the east coast of Kalimantan) "fly a Dutch flag to show that they have surrendered to the 'Company' and the *panggawa* [*penggawa*] has an open letter from the king of Gowa [located on south Sulawesi, then part of the Dutch East Indies], which is used as a kind of passport or recommendation"[89].

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[85] MCM, para. 2.16.

[86] See ICM, paras. 7.23-7.29.

[87] *The Bajau Laut*, Oxford University Press, 1997, p. 16.

[88] *Ibid.*, p. 29.

5.32 Malaysia boasts that Indonesia has not been able to demonstrate any effective presence of Boeloengan on the disputed islands, or to prove the formal claims of either the Boeloengan Sultanate or The Netherlands. This is partially true. However, despite Malaysia's numerous assertions to the contrary, the situation is exactly the same for Malaysia. Neither the Sultanate of Sulu, the BNBC in the period 1878-1891, nor the British negotiators during the discussions which led to the conclusion of the 1891 Convention, ever made any reference to either Ligitan or Sipadan. None of the documents furnished by the Parties to the present case, and none of the documents which Indonesia has been able to consult, gives any indication of any act of administration over the disputed islands by either of Malaysia's predecessors in title prior to 1891.

5.33 Moreover, it is certainly not the case that Boeloengan, in contrast to Sulu, was "a small land-based sultanate"[90] with no maritime connection. Indeed, Boeloengan considered itself as both a land *and* a maritime territory as witnessed, for example, by the very terms of the Contract between the Sultan and the Government of the Netherlands East Indies of 12 November 1850:

> "The following islands belong to Boeloengan: Terakkan, Nenoekkan and Sebittik, with the small islands belonging thereto"[91].

5.34 As recognised by Professor Houben in his report, "[t]he composition of Bulungan society was complex. Besides Malays one could find Dayak, Taosug (from the Sulu Archipelago) and Bugis (from South Sulawesi)"[92], of which the latter two were maritime people *par excellence*. In his well documented book, *The Sulu Zone 1768-1898*[93], Dr. James Warren stresses the presence of Bugis and Taosug in Boeloengan and explains the importance of their trade in spices and slaves with Sulu (and Makassar)[94]. Professor Victor T. King also refers to "Bugis merchants who were based on the east coast of Borneo in the Sultanate of

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[89] See *ibid.*, pp. 29-30.
[90] MCM, para. 3.9.
[91] IM, Vol. 2, Annex 13.
[92] MCM, Appendix 1, para. 4.7.
[93] Singapore University Press, 1981.
[94] See, for example, pp. 10-13 and 84-87.

Kutei and in the small realms of Berau and Bulungan and who connected up Sulu commerce with the eastern Indonesian spice trade"[95]. And, as is also conceded by Professor Houben, intense "trade relations existed between Bulungan and Bajau people from the Sulu Archipelago [...] Trade with the Bugis existed as well"[96]. Similarly, the 1917 edition of the *Encyclopaedie van Nederlandsch-Indie* indicated that the Bugis "are especially distinguished by their suitability and predilection for the shipping trade, which is even now [...] lively and of importance", and that "[c]enturies ago they were known as good navigators".

5.35 The 1891 Convention put an end to this uncertainty: the 4° 10' N parallel cut across the rival claims of the parties. This clearly establishes an argument to which Malaysia seems to attach a certain weight but which in reality fully supports Indonesia's position. According to Malaysia, it is significant that at the time of the conclusion of the 1891 Convention the Sultan of Boeloengan only requested that certain rights to land between Broershoek and Batoe Tinagat be preserved, but not the right to collect produce on the islands[97]. Malaysia thus concludes that: "[i]f the Sultan of Bulungan had considered the islands east of Batu Tinagat as within his possessions, he would no doubt have claimed"[98] this right for his people.

5.36 In reality the Sultan of Boeloengan's request proves two discrete but equally important things:

- Firstly, it establishes that the Sultan clearly considered that he had rights with regard to the territory between Broershoek and Batoe Tinagat, which sits uncomfortably with the Malaysian argument that he had no claims to this area;

- Second, it would indicate that, so far as turtle eggs on Sipadan and Ligitan were concerned, the Sultan had no need to seek the continuation of such rights since they had been preserved to The Netherlands (and the Sultan of Boeloengan) by the 1891 Convention.

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[95] *The Peoples of Borneo*, Blackwell, Oxford, 1993, p. 139.

[96] MCM, Appendix 1, para. 6.4.

[97] MCM, paras. 2.17-2.18.

[98] *Ibid.*, para. 2.18.

Section 4. Conclusion

5.37 At paragraph 3.5 of its Counter-Memorial, Malaysia notes that the Parties agree on one point: "There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*". This is true, provided that two points are clarified.

5.38 On the one hand, Indonesia took care to point out at several places in its Counter-Memorial[99], that this was true "at all relevant times", i.e., after 1891. Before that date, the only possible inference that can be drawn from an impartial examination of the situation is that the status of both islands was, at best, uncertain: they were uninhabited, and neither Party has been able to provide any evidence that they were administered by the local rulers before 1891.

5.39 On the other hand, Indonesia can accept that the islands were considered as appertaining to the local coastal Ruler. However, while Malaysia has failed to provide *any* evidence of a pre-1891 Sulu title over them, Indonesia has established that all the territory south of Batoe Tinagat was under the control of Boeloengan. Thus, there is support for the contention that prior to the colonial conquest the disputed islands were not *terrae nullius*, if the situation is considered not from the perspective of contemporary international law, but from that of conceptions of territory existing in that part of the world at that time. As Indonesia showed at length in its Memorial[100] – and not denied by Malaysia, which has failed to make any mention of this important point in its Counter-Memorial – the idea the local rulers had of their relations to territory was very different from that held by European States. This idea entailed consequences in respect of islands located off their mainland territory[101]: in this area, which comprised hundreds of islands, many of which were uninhabited, the effectiveness of power did not have any particular importance, but it was inconceivable that these islands could be considered to be *res nullius* in the European or contemporary sense of the expression.

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[99] ICM, paras. 2.14, 3.2, 7.3 and 7.9(b).

[100] IM, paras. 4.3, *et seq.*

[101] See *ibid.*, paras. 4.18 and 4.39-4.45.

5.40 The general conclusions regarding the pre-1891 situation are thus as follows:

(a) even if, in view of ideas concerning territory prevalent at that time, Ligitan and Sipadan cannot be considered to be *terrae nullius*, neither Malaysia nor Indonesia have been able to provide any formal evidence that these islands were possessions of the Sultan of Sulu or the Sultan of Boeloengan;

(b) all the alleged demonstrations of authority on which Malaysia relies took place *after* 1891 and do not concern the disputed islands directly, nor were they made *à titre de souverain*;

(c) the Bajau Laut were not subject to any durable political control, and their activities cannot bestow a real territorial title on either Party. Moreover, Malaysia has not adduced any evidence that the Bajau Laut had any connection with the islands prior to 1891;

(d) whilst the BNBC did not carry out any activities south of Semporna before the conclusion of the 1891 Convention, it has been proven (and acknowledged by Malaysia and Professor Houben) that the Dutch were established in Tawau and in the region of the cape of Batoe Tinagat prior to 1891;

(e) this situation was challenged by Great Britain on the tenuous basis of the 1878 grant, the wording of which, however, would seem to imply that the Sultan of Sulu considered that his territory on the north-east coast of Borneo extended as far as Darvel Bay but not further south. The uncertainty concerning the position of the "Sibuco River" was created entirely *ex post facto* by the British in the framework of their negotiations with the Dutch;

(f) *in any case, the 1891 Convention was intended to and did remove all ambiguity* in this respect and, as Indonesia has shown in Chapter I of this Reply, the pre-1891 situation is irrelevant for this dispute except in so far as it shows the northward reach of Dutch claims and, generally, the uncertainties regarding the extent of British and Dutch possessions in the area.

CHAPTER VI

THE ABSENCE OF MALAYSIAN SOVEREIGNTY OVER THE ISLANDS BASED ON A CHAIN OF TITLE PASSING FROM SPAIN TO THE UNITED STATES TO GREAT BRITAIN

Section 1. Introduction

6.1 Malaysia's principal claim is that it inherited sovereignty over the islands of Sipadan and Ligitan as a result of a series of international agreements involving Spain, the United States and Great Britain. The foundation for this so-called "treaty title" lies in the following chain of events[1].

(i) Spain is said to have acquired title to the disputed islands from the Sultan of Sulu on the basis of the 1836 Capitulations and the 1851 Act of Submission.

(ii) In the 1885 Protocol with Great Britain and Germany, Spain relinquished all title to the Sultan's territories on North Borneo, including islands lying within three marine leagues of the North Borneo coast.

(iii) While Spain never thereafter claimed sovereignty over all of the islands lying more than three marine leagues from the coast – its claim being restricted to islands which it actually occupied in the Sulu Archipelago – the United States allegedly did advance such a claim after it acquired Spain's territorial possessions under the 1898 and 1900 treaties.

(iv) Specifically, the United States is said to have claimed both Sipadan and Ligitan in diplomatic correspondence with Great Britain in the early 1900's, by virtue of the voyage of the *U.S.S. Quiros* in 1903, and by the issuance of a map in the same year[2].

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[1] See generally MCM, para. 3.1.

(v) Great Britain allegedly acknowledged United States sovereignty over the islands in an Exchange of Notes in 1907, but the BNBC is said to have continued to administer the islands anyway.

(vi) This situation continued until the conclusion of the 1930 Anglo-American Convention pursuant to which, according to Malaysia's theory, Sipadan and Ligitan were ceded by the United States to Great Britain.

6.2 This chapter will demonstrate that each of these propositions is contradicted by the historical record. Given that there is no evidence that the Sultan of Sulu ever possessed title to Sipadan or Ligitan in the first place[3], this chapter will focus on the series of relevant transactions involving Spain, the United States and Great Britain. To assist the Court in identifying the various locations and lines referred to in this chapter, Indonesia has provided a fold-out map following page 130 at the end of this chapter. Indonesia is confident that a review of the evidence before the Court regarding these events supports the following conclusions:

(i) Malaysia has introduced no evidence showing that Spain considered it had title to either Sipadan or Ligitan. Nor is there any evidence that Spain occupied the islands or carried out any acts of administration on them. While the 1877 and 1885 Protocols provided that Spain could expand its presence in the Sulu Archipelago to islands not yet occupied, this was subject to the condition that it notify Great Britain and Germany accordingly. Spain never did so with respect to Sipadan or Ligitan. It follows that Spain cannot be deemed ever to have acquired sovereignty over the two disputed islands.

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[2] This map is Map 5 in Malaysia's Map Atlas.

[3] See Chapter V above and ICM, Chapter III.

(ii) The fact that Spanish sovereignty did not extend to Sipadan or Ligitan is also evidenced by examining the scope of the territories that Spain relinquished to the United States under the 1898 and 1900 Treaties. These instruments show that the southwesternmost limits of the possessions over which the United States acquired sovereignty were Sibutu Island and its immediate dependencies. These islands are located well to the north and east of Sipadan and Ligitan.

(iii) Although a United States vessel, the *Quiros*, visited Sipadan in 1903, the United States never claimed sovereignty over the islands. Moreover, the 1903 U.S. map, which tentatively depicted the two islands as falling within U.S. territories and to which Malaysia attaches so much importance, was expressly revoked by the United States later that year and the boundary line depicted on the map was removed from subsequent versions of the map[4].

(iv) In 1907, Great Britain and the United States reached an understanding which permitted Great Britain to continue to administer certain islands lying more than three marine leagues from the coast of North Borneo without prejudice to the question of sovereignty. While Malaysia asserts that Sipadan and Ligitan were two of the islands then being administered by the British, there is no evidence to support this contention. To the contrary, correspondence exchanged between the United States and Great Britain shows without any doubt that the islands that were intended to be covered by the 1907 agreement – i.e., that were actually being administered by the British at that time – were the Turtle and Mangsee Islands. These two groups lay well to the north of Sipadan and Ligitan and had nothing to do with them. Nowhere is there any evidence that the 1907 Exchange of Notes was intended to include Sipadan or Ligitan and there was no British "administration" of any kind on these islands at the time.

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[4] See paras. 6.38-6.40, below.

(v) In the discussions leading up to the 1930 Anglo-American Convention, the United States advanced specific claims to the Turtle and Mangsee Islands, both of which groups lay more than three marine leagues from the North Borneo coast. These islands were ultimately recognised as belonging to the United States in the 1930 Convention. But the United States raised no such claim to Sipadan and Ligitan and the Convention did not cover them. In sum, both islands lay far beyond anything ever claimed by the United States.

6.3 It follows from the above that Spain never had any title to Sipadan or Ligitan which it could have passed on to the United States (*nemo dat quod non habet*). Nor did the United States ever consider itself as possessing sovereignty over the islands. Consequently, there could be no question of the United States "ceding" the islands back to Great Britain in 1930; the 1930 Convention was in no way a treaty of cession. Both Sipadan and Ligitan were Dutch possessions pursuant to the 1891 Convention and the Dutch went so far as to send a naval vessel – the Lynx – to them in 1921 in a physical demonstration of its sovereignty. Nothing that Spain, the United States or Great Britain did in the region ever even remotely displaced that title.

Section 2. Sipadan and Ligitan Did Not Fall Within Spain's Possessions in the Area

A. The 1836 Capitulations and the 1851 Act of Submission

6.4 The Parties agree that the starting point for assessing the extent of Spanish possessions in the Sulu Archipelago lies in the 1836 Capitulations and the 1851 Act of Submission between Spain and the Sultan of Sulu. By the former instrument, Spain acquired seigniory and protection over the Sultan's possessions in the Sulu Archipelago[5]. By the latter, Spanish rights ripened into full sovereignty[6]. However, the Parties differ as to the geographic limits of the possessions thus falling under Spanish control. As a result, it is necessary to revisit briefly both of these instruments.

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[5] IM, Vol. 2, Annex 9.

[6] MM, Vol. 2, Annex 4.

6.5 In previous submissions, Indonesia pointed out that Article 1 of the 1836 Capitulations defined the extent of Spanish protection provided to the Sultan of Sulu as extending "from the western extremity of Mindanao to Borney [Borneo] and La Paragua [Palawan], with exception of Sandacan and the other territories tributary to the Sultan on the mainland of Borney"[7]. Though loosely worded, an examination of the map of the area shows that this definition could not reasonably have included either Sipadan or Ligitan[8]. Both islands lie well to the south and west of the Sulu Archipelago in its proper sense, particularly bearing in mind that the Spanish rights in the area were defined by reference to the "western point of Mindanao". Moreover, Sipadan and Ligitan could not have formed part of the Sultan of Sulu's Borneo possessions since these were subsequently defined as only encompassing islands falling within three marine leagues of the mainland coast. On the face of it, therefore, the 1836 Capitulations did not cover either Sipadan or Ligitan.

6.6 In the 1851 Act of Submission, Spain acquired sovereignty over "the Island of Sooloo with all its dependencies"[9]. Geographically, neither Sipadan nor Ligitan can be considered to form part of the dependencies of the Island of Sulu which lies over 100 nautical miles to the north and east of Ligitan, the nearest of the two disputed islands. Moreover, Malaysia has introduced no evidence to show that Spain ever deemed Sipadan or Ligitan to fall within its possessions. In Malaysia's own words, Spain was "indifferent" and not interested in either island[10].

B. The 1877 and 1885 Protocols

6.7 The 1877 Protocol was concluded in order to settle difficulties which had grown out of Spanish interference with British and German vessels trading with the Sulu Archipelago. The Protocol accorded to ships of Great Britain and Germany freedom of commerce within the

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[7] IM, Vol. 2, Annex 9.

[8] See ICM, paras. 6.4-6.5, and Map 6.1.

[9] See Art. 1 of the 1851 Act of Submission, MM, Vol. 2, Annex 4.

[10] MM, paras. 5.19, 5.20(c) and 5.30.

Sulu Archipelago with respect to islands already occupied and administered by Spain. Article III of the Protocol went on to provide:

> "In case Spain should occupy effectively other places in the archipelago of Sulu, and provide thereat the offices and employees necessary to meet the requirements of commerce, the Governments of Great Britain and Germany shall not object to the application of the rules already stipulated for places occupied at present. But, in order to avoid the possibility of new claims due to the uncertainty of business men in regard to the places which are occupied and subject to regulations and tariffs, the Spanish Government shall, whenever a place is occupied in the Sulu archipelago, communicate the fact to the Governments of Great Britain and Germany, and inform commerce at large by means of a notification which shall be published in the official journals of Madrid and Manila"[11].

6.8 Prior to the 1877 Protocol, Spain never occupied Sipadan or Ligitan. After 1877, Spain never notified Britain or Germany that it had undertaken a new occupation of either island. It may be concluded, therefore, that Spain did not consider that either of these islands fell within its dominions either before or after the 1877 Protocol. Certainly, Malaysia has introduced nothing in the record to suggest otherwise.

6.9 In its Counter-Memorial, Malaysia claims that, before 1878, a so-called "authoritative" Dutch map of the area showed Sipadan and Ligitan as falling within the dominions of Sulu and hence of Spain[12]. This argument is misplaced. The map which Malaysia refers to is a rather rudimentary map first published in 1849 and revised in 1870, well before the 1877 Protocol, the 1878 grant to Dent and Overbeck and the 1891 Convention were concluded. The map actually shows the territories of Boeloengan and Tidoeng, which were under Dutch control, as extending to the *north* of Sebatik Island – i.e., north of the 4° 10′ N latitude which was ultimately agreed in the 1891 Convention. Sipadan is labelled on the map, but its geographic location is inaccurately depicted and it is not shown to belong to Sulu. As Indonesia has repeatedly shown, it was precisely in order to remove any ambiguities as to the extent of the respective territories of Boeloengan and Sulu that The Netherlands and Great Britain agreed on the 4° 10′ N line as separating their territorial possessions in the 1891 Convention.

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[11] *Ibid.*, Vol. 2, Annex 5.

[12] MCM, para. 3.1(a), referring to Map 3 in Malaysia's Map Atlas.

6.10 Turning to the 1885 Protocol, in Article I the Governments of Great Britain and Germany recognised Spanish sovereignty "over the places effectively occupied, as well as over those places not yet so occupied [by Spain], of the Archipelago of Sulu (Jolo)". Article II, in turn, repeated the formula that had appeared in the 1836 Capitulations – namely, that the Sulu Archipelago:

> "comprises all the islands which are found between the western extremity of the island of Mindanao on the one side and the continent of Borneo and the Island of Paragua [Palawan] on the other side, with the exception of those which are indicated in Article III"[13].

In Article III, Spain relinquished in favour of Great Britain all claims of sovereignty over the territories of Borneo which then belonged, or had belonged in the past, to the Sultan of Sulu and which comprised the islands of Balambangan, Banguey and Malawali as well as other islands that were administered by the BNBC falling within three marine leagues of the coast. Article IV then went on to repeat the provisions appearing in the 1877 Protocol to the effect that if Spain were to occupy other islands in the archipelago, it would inform Great Britain and Germany who, presumably, would then recognise Spanish sovereignty over such islands.

6.11 As previously indicated, Spain never occupied Sipadan or Ligitan and thus no notification was ever issued. The circumstances both before and after the conclusion of the 1885 Protocol thus confirm that Spain did not possess sovereignty over either of the disputed islands at the time.

6.12 Despite the clear terms of the 1885 Protocol, Malaysia argues that there was a distinction between the Sulu Archipelago as a geographical entity and the extent of the dominions of Sulu. In Malaysia's words:

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[13] MM, Vol. 2, Annex 15.

> "The fact that the Sultan did not grant islands beyond 3 marine leagues to the BNBC did not mean that he did not claim or own those islands, or that the islands were part of the Sulu Archipelago in the geographical sense"[14].

Malaysia goes on to suggest that there could have been other islands situated more than three marine leagues (nine miles) from the coast of North Borneo, such as Dinawan, which no one considered to be part of the Sulu Archipelago in the geographic sense[15].

6.13 Malaysia's argument misses the point. Undoubtedly, there were islands situated more than nine miles from the coast which were not granted to the BNBC pursuant to the 1878 grant to Dent and Overbeck or the 1885 Protocol. Dinawan may have been one of these; Sipadan and Ligitan were others. But that does not mean that these islands belonged to the Sultan of Sulu. What is important is the fact that Spain never considered that it had title to these islands as part of the possessions it acquired from the Sultan of Sulu, and neither did the United States, as shall be presently seen. Nonetheless, to the extent that there were uncertainties as to the respective limits of the possessions which had been granted to the BNBC and those acquired by The Netherlands, the 1891 Convention settled these issues once and for all. It adopted the 4° 10' N parallel of latitude as a practical compromise separating each side's territorial possessions.

6.14 In the light of the relevant treaty instruments, there are no grounds for Malaysia's assertion that Sipadan and Ligitan formed part of Spain's possessions prior to the Spanish-American War. Not once did Spain claim or even suggest that the islands belonged to it. Nor did the Sultan of Sulu express any interest over them. An essential link in Malaysia's alleged chain of title is thus missing. As Malaysia itself concedes, "Evidently if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900"[16].

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[14] MCM, para. 3.12.

[15] *Ibid.*

[16] *Ibid.*, para. 3.17.

Section 3. The United States Did Not Consider that it Had Sovereignty over Sipadan or Ligitan

A. The 1898 an 1900 Spanish-U.S. Treaties

6.15 With respect to the 1898 Treaty, the Parties are in complete agreement[17]. This agreement identified the southern limit of the Spanish possessions acquired by the United States as falling along the 4° 45' N parallel of latitude. Clearly, as can be seen on Map 10 at the end of this chapter, this limit was well to the north of Sipadan and Ligitan and thus excluded them.

6.16 However, the Parties differ as to the scope of the 1900 Treaty. That Treaty extended the geographic scope of the 1898 Treaty so as to include amongst the islands relinquished by Spain "any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that [the 1898] Treaty and particularly to the islands of Cagayan Sulu and Sibutu and their dependencies"[18].

6.17 Indonesia's position is that, according to the plain and ordinary meaning of the 1900 Treaty, the southern limit of U.S. possessions acquired from Spain included Sibutu and its dependencies, but not Sipadan or Ligitan which lay much further south and west and which were not part of the Philippine Archipelago. Certainly on geographic grounds, neither Sipadan nor Ligitan can be considered as constituting dependencies of Sibutu, and Malaysia, quite correctly, does not argue as much.

6.18 Malaysia's position appears to be that the language of the 1900 Treaty – "particularly to the islands of Cagayan Sulu and Sibutu and their dependencies" – was broad enough so as to include other islands, not named in the Treaty, within the rubric of its terms. Malaysia cites as an example the Turtle Islands, which were being administered by the BNBC in 1900, but which were not mentioned by name in the Treaty[19].

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[17] ICM, para. 6.16; MCM, para. 3.19.

[18] IM, Vol. 3, Annex 94.

6.19 Malaysia's reference to the Turtle Islands is particularly appropriate. Geographically, the Turtle Islands lay in the vicinity of the island of Cagayan Sulu and thus could have been considered to be dependencies of that island. More important, however, is the fact that the United States subsequently did claim title to the Turtle Islands – a claim which was recognised as valid by Great Britain in the 1930 Convention. At the same time, the United States did not similarly claim Sipadan or Ligitan which lay to the south of any U.S. interests in the area. This difference in conduct reinforces the fundamental distinction that the United States drew between islands lying to the north of Sibutu and those lying to the south. With respect to the former, the United States raised specific claims wherever the islands in question lay more than three marine leagues from the mainland coast. But with respect to the latter, the United States raised no such claims because they lay beyond the territories that the United States considered it had inherited from Spain.

6.20 There is an important piece of evidence which corroborates this conclusion but which has been ignored by Malaysia. This is the letter of 23 October 1903 from the U.S. Secretary of State to the Secretary of War. In relevant part, it read:

> "The treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as exceptional *and as a limit to the claims of Spanish dominion to the southwest of the Sulu group*"[20].

6.21 As will be seen, it was because the State Department viewed Sibutu and its dependencies as the limit of Spanish possessions in the area that (i) the United States never claimed sovereignty over Sipadan or Ligitan; (ii) maps showing U.S. possessions extending to these two islands were ordered to be withdrawn; (iii) the question of sovereignty over Sipadan and Ligitan never arose in the discussions between the United States and Great

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[19] MCM, para. 3.19.

[20] IM, Vol. 3, Annex 104. Emphasis added.

Britain leading up to the 1930 Anglo-American Convention; and (iv) the ultimate boundary line agreed in that Convention did not extend south of Sibutu and its dependencies.

B. The Events of 1903

6.22 According to Malaysia, 1903 was an important year in the development of the United States' position. The problem is that Malaysia has only told half of the story. Many important documents and maps dating from 1903, which fundamentally contradict Malaysia's thesis, are simply ignored or miscited thus producing a decidedly misleading picture of events.

6.23 To give a sample of the difficulties created by Malaysia's selective treatment of the evidence, the following may be mentioned:

(i) Malaysia fails to point out that the U.S. State Department, which was responsible for boundary issues affecting the Philippines, did not concur with the Navy Department's earlier view that the United States possessed sovereignty over *all* islands lying more that three marine leagues from the coast of North Borneo, including those lying south of Sibutu Island and its dependencies. The State Department's view was very different in maintaining that effectively U.S. possessions were limited in the south to Sibutu and its dependencies.

(ii) The State Department did not endorse the voyage in 1903 of the *Quiros* and did not claim sovereignty over Sipadan or Ligitan as a result of this voyage.

(iii) The boundary line on the 1903 U.S. map (H.O. Chart 2117), repeatedly relied on by Malaysia as showing the disputed islands as U.S. possessions, was revoked on the express orders of the State Department later in 1903. The map was subsequently reissued without the boundary line, a fact which Malaysia studiously ignores.

(iv) **Instead, other maps, left unmentioned by Malaysia, were issued by the United States showing that the United States had no claim as far south as Sipadan and Ligitan.**

6.24 It is undisputed that the State Department had the final say in deciding which islands the United States laid claim to[21]. On 3 April 1903, the Secretary of State wrote a letter to the Secretary of the Navy in which Sibutu was clearly identified as constituting "the most southwesterly of the Sulu Group proper"[22]. Malaysia contends that the Secretary of State made a distinction between "the whole of the Sulu Archipelago" and "the Sulu Group proper… The main Archipelago" when he wrote this letter[23]. Though not specifically stated, the implication of this argument is that Sipadan and Ligitan might somehow have been considered to form part of "the whole of the Sulu Archipelago" in its broad sense, and thus not excluded from the scope of the 1900 Treaty, even though they were not part of "the Sulu Group proper".

6.25 In the first place, Malaysia miscites the letter. Malaysia claims that the Secretary of State agreed with the Secretary of the Navy's view that "the sovereignty of the United States covers *all* outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo, except the islands of Balambangan, Bangugy and Malawali"[24]. But this is not what the letter says. In reciting the words quoted above, the Secretary of State was reflecting the position of the Secretary of the Navy, *not* the State Department's own position. Malaysia simply omits the preceding line of the letter in which the Secretary of State says that "it is your [i.e., the Secretary of the Navy's] understanding that the sovereignty of the United States covers…".

6.26 In point of fact, the State Department's views were very different. Far from concurring that the sovereignty of the United States extended to *all* islands lying more than three marine leagues from the coast of British North Borneo, the Secretary of State indicated that U.S.

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[21] See, for example, letter from Major E.R. Hills, War Department to the Commanding General, Division of the Philippines dated 12 May 1903. Annex 6 to this Reply.

[22] IM, Vol. 3, Annex 98, p. 2 of the letter.

[23] MCM, para. 3.20.

[24] *Ibid.*, para. 3.20, citing from the Secretary of State's Letter of 3 April 1903 to the Secretary of the Navy. Emphasis added.

sovereignty extended to "the whole of the *Sulu Archipelago* up to three marine leagues of the mainland coasts of British North Borneo"[25]. It is in this context that the letter concludes:

> "The Protocol of 1885 between the same Powers (a) expressly recognized the sovereignty of Spain over all parts of the Sulú Archipelago then or thereafter to be effectively occupied by Spain; (b) defined the limits of the Archipelago as extending from Mindanao to Borneo and Palawan and including Balabac and Cagayan-Joló"[26].

Hence it was acknowledged by the Secretary of State that Spain had only exercised sovereignty over territories within the Sulu Archipelago as defined in (b) *and* which had been effectively occupied by Spain, neither of which conditions applied with respect to Sipadan and Ligitan.

6.27 This difference – the emphasis on the "Sulu Archipelago" as opposed to "all islands" – is important for a proper understanding of the United States' position. Subsequent documents reveal unequivocally that the State Department did not accept the view that the Sulu Archipelago extended as far south as Sipadan and Ligitan. As already noted, the Secretary of State's position was that Sibutu Island and its dependencies represented the southwesternmost limit to United States possessions in the region.

6.28 Malaysia asserts that it was on the basis of the 3 April letter that the U.S. Navy's Hydrographic Office prepared in June 1903 a map labelled "Northern Shore of Sibuko Bay". This map appeared to show Dinawan, Si Amil, Ligitan and Sipadan as "under the sovereignty of the United States of America"[27]. Not surprisingly, the map commands a special place in Malaysia's case. It is repeatedly referred to both in Malaysia's Memorial and its Counter-Memorial to support the proposition that the United States claimed sovereignty over Sipadan and Ligitan in 1903. But the facts are otherwise.

6.29 First of all, Malaysia is confused as to the source of the map. At paragraph 5.25 of its Memorial, Malaysia states: "In 1903, in response to a direction from the Secretary of the Navy, the United States Hydrographic Office published a chart of the 'Northern Shore of

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[25] *Ibid.* Emphasis added.

[26] IM, Vol. 3, Annex 98, p. 15 of the letter.

[27] MCM, para. 3.20.

Sibuko Bay"'. However, the document referred to as authority for this statement is actually a memorandum drafted by the Acting Hydrographer of the U.S. Navy dated 8 August 1903[28]. It states:

> "In accordance with instructions from the Chief of Bureau of Equipment, the following method will be observed in delineating the S.W. boundary of the United States possessions in the Philippines for the Commissioner of the General Land Office: -
>
> The line will follow the "boundary line" as laid down on Hydrographic Office charts Nos. 2116, 2117, 2118, 2119, 2121, 2122, and 1709...".

6.30 On the bottom right hand corner of the June 1903 map, which is reproduced for convenience facing this page, it can be seen that it is in fact H.O. Chart No. 2117, one of the maps to be used as guidance according to the 8 August 1903 memorandum, and not the consequence or "response" to this memorandum as Malaysia maintains.

6.31 Malaysia has thus failed to explain the true origin of the June 1903 map. The memorandum in question cited by Malaysia appears to have resulted in the placing of various boundary lines on a quite different map, but that map has not been produced.

6.32 While Malaysia thus gets off on the wrong foot, it is only afterwards that Malaysia's version of events completely breaks down. For Malaysia has failed to point out that, on 20 October 1903, the Acting Secretary of War forwarded to the Secretary of State the map that appears to have been prepared using H.O. Chart 2117 as "guidance" and asked the State Department to confirm that the boundary line depicted on the map was the correct line[29]. The Secretary of State replied by letter dated 23 October 1903 to which reference has already been made. Despite the fact that Indonesia drew attention to this letter in its Memorial and annexed a copy thereto[30], Malaysia failed to address the point in its Counter-Memorial. Regrettably, therefore, it is necessary to recall what the Secretary of State had to say about the matter.

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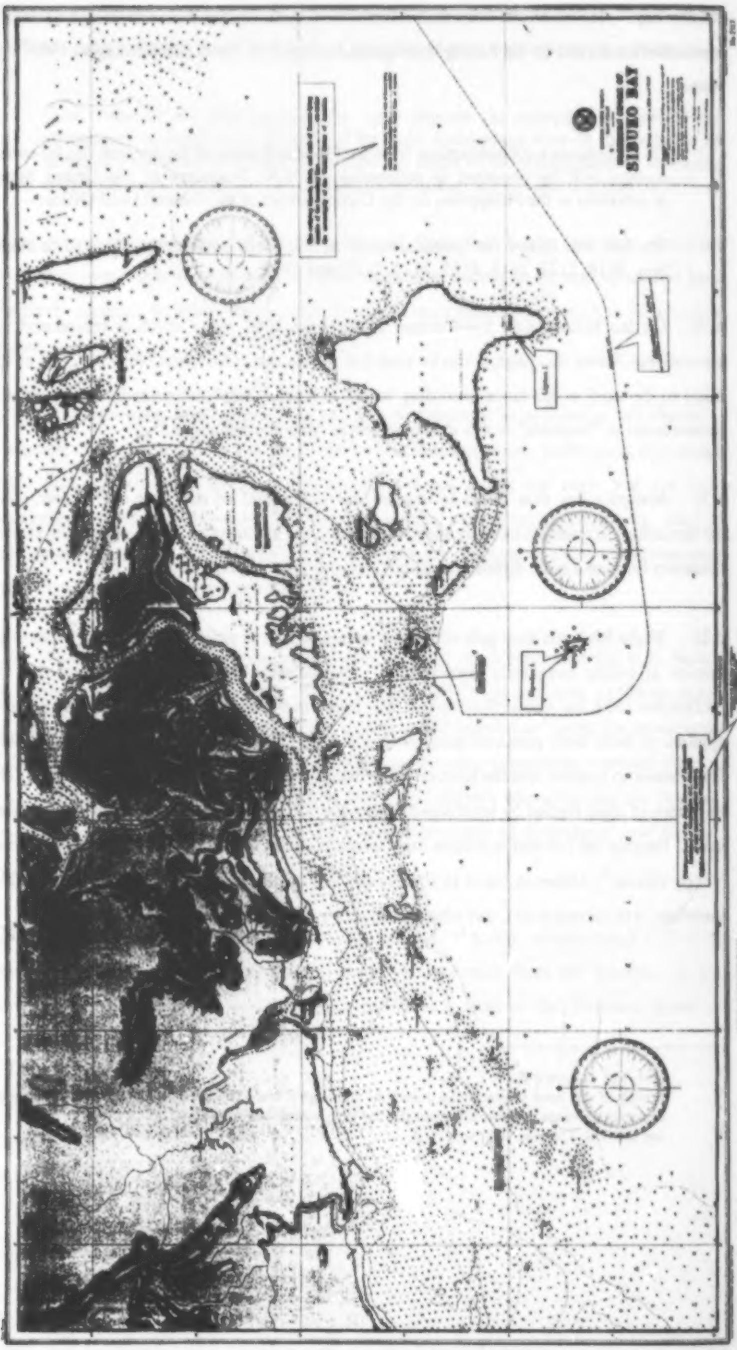
[28] MM, Vol. 3, Annex 62.

[29] A copy of this letter is attached as Annex 8. Although it bears the date of 23 October 1903, from the Secretary of State's response it appears that the letter was actually dated 20 October 1903.

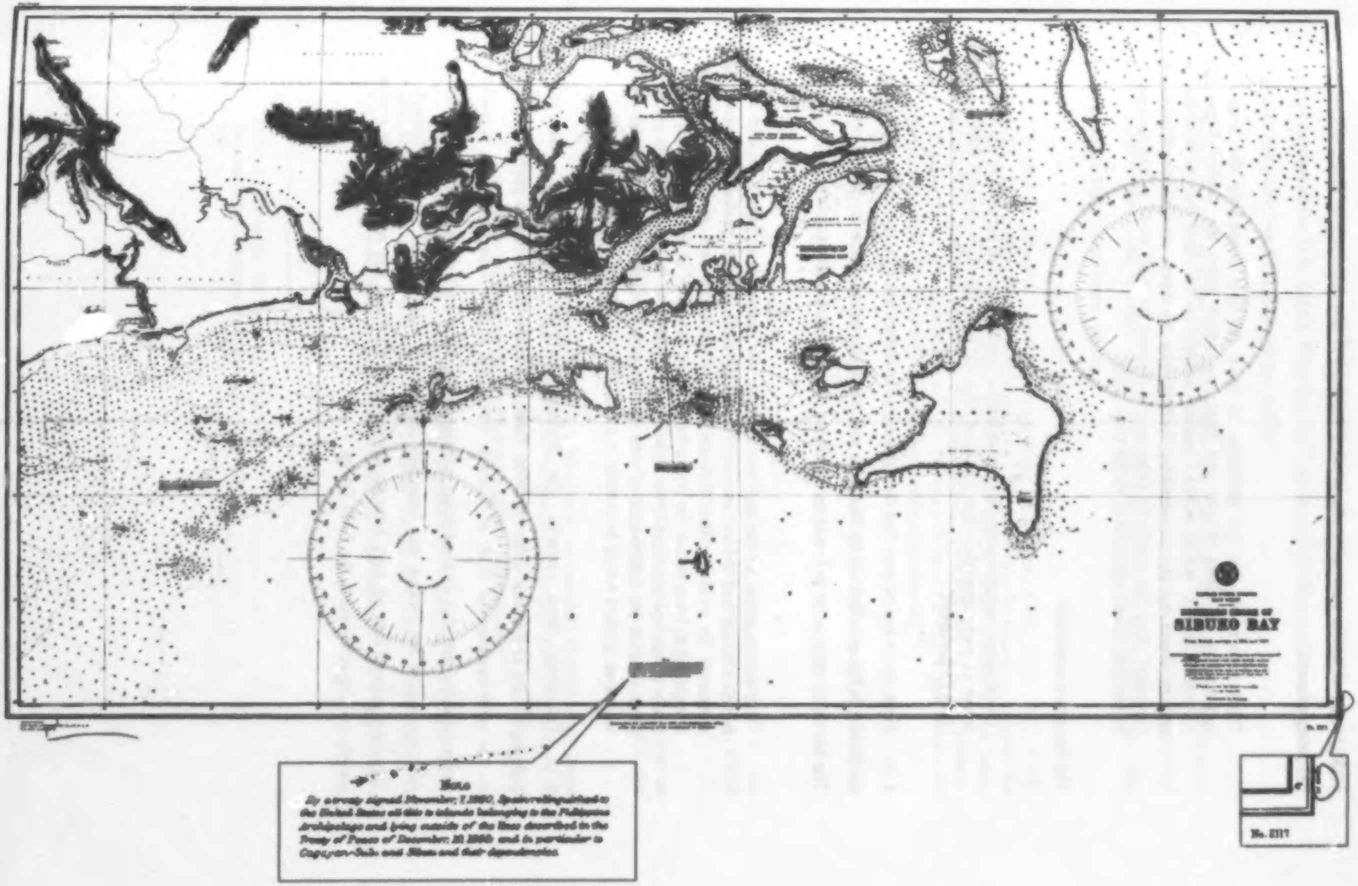
[30] See IM, Vol. 3, Annex 104.

1903 MAP RELIED UPON BY MALAYSIA



Map 7

1903 MAP RE-ISSUED BY THE UNITED STATES PURSUANT TO SECRETARY OF STATE'S INSTRUCTIONS OF 23 OCTOBER 1903


SIBUKO BAY
Note
By a treaty signed November 7, 1900, Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside of the lines described in the Treaty of Peace of December 10, 1898, and in particular to Cagayan-Sulu and Sibutu and their dependencies.
No. 2117

Map 8

6.33 After referring back to his letter of 3 April 1903, the Secretary of State offered the following remarks:

> "This department did not undertake to trace the line demarking the respective jurisdictions of Great Britain and Spain, to which latter the United States has succeeded *in toto*. We are not in a position to apply on the charts the line described in general terms by the conventions entered into by Spain and Great Britain and Germany. Any line drawn by either part in interest for itself alone would necessarily be tentative unless assented to by the other party".

The Secretary continued:

> "Under these circumstances this department is unable to either confirm or alter the line drawn ex parte upon the chart you have received from the Hydrographic Office of the Navy Department".

6.34 From this it can be seen that the drawing of boundary lines such as those appearing on the June 1903 map relied on by Malaysia was not endorsed by the U.S. State Department. The Secretary went so far as to add the following highly pertinent observation:

> "The prolongation of the red tracing from the eastward of Sibutu to and around Sipadan Island and thence northwardly to Darvel Bay would probably require to be supported by evidence that Sipadan and the included keys and rocks had been recognised as lying within the dominions of Sulu described in the conventions between Spain on the one hand and Great Britain and Germany on the other. This is a question of fact which the department of state has no means of determining and considering which an opinion would be mainly ex parte".

6.35 Following these remarks, the Secretary referred to the fact, discussed at paragraph 6.20, above, that under the 1900 Treaty the island of Sibutu was probably intended as the southwesternmost limit of Spanish dominions in the Sulu group. It is perfectly understandable that this determination influenced the Secretary's decision that U.S. maps of the area *should not include* any boundary line around Sipadan and Ligitan. Instead, the Secretary ordered that all such lines be deleted from the maps and replaced with a caption simply making reference to the 1900 Treaty.

6.36 Following receipt of the 23 October 1903 letter, the Secretary of the Navy informed the Commander of the U.S. Asiatic Fleet that the Hydrographic Office had been instructed to delete the boundary line from charts of the region[31].

6.37 In fact, the record shows that H.O. Chart 2117 was only issued pending approval by the State Department and never actually published. The first endorsement of the Secretary of State's 3 April letter to the Secretary of the Navy indicates that the Bureau of Equipment sent the chart to the Navy Department, stating:

> "The Bureau forwards herewith seven charts (H.O. Nos. 1709, 2116, 2117, 2118, 2119, 2121, and 2122) upon which are drawn lines showing the boundary between the possessions of the United States and those of British North Borneo as set forth, according to its interpretation, in the accompanying letter from the State Department. If these lines are pronounced correct, the Bureau will have the charts published with the boundaries in accordance with instructions of the Department"[32].

6.38 As the sixth endorsement confirms, on 25 November 1903 the letter and maps (including H.O. Chart 2117) were:

> "Respectfully returned to the Bureau of Equipment inviting attention to the correspondence between the Secretary of State and the Acting Secretary of War, which was referred to the Bureau of Equipment on October 24, 1903.
>
> 2. The Department accordingly directs that, for the present, the boundary line be omitted from the charts; and that a note be printed, either in the general legend of the chart or in brackets, in situ, reading:
>
>> 'By a treaty signed November 7, 1900, Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside of the lines described in the Treaty of Peace of December 10, 1898; and in particular to Cagayan-Sulu and Sibutu and their dependencies'"[33].

6.39 Malaysia's pleadings fail to point out this important development. To set the record straight, Indonesia has attached a copy of the original version of Chart 2117 introduced by Malaysia and the reissued version of the map which Malaysia neglects. Both maps appear after page 116. As can be seen from the caption in the bottom right corner of the reissued map, it was the "second edition" of the map. No longer did the map indicate that U.S. possessions included Sipadan and Ligitan. Instead, there was a reference at the bottom of the map to the 1900 Treaty as had been suggested by the Secretary of State. From this it can be seen that Malaysia's assertion that "whatever definition might be given to the 'Sulu Archipelago', the United States did in fact claim all these islands, as the 1903 map shows" is demonstrably wrong[34].

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[31] Letter of 31 December 1903, Annex 9 to this Reply.

[32] The letter and endorsements are at Annex 5 to this Reply.

[33] *Ibid.*

6.40 Nor does Malaysia disclose the fact that the map that was prepared pursuant to the memorandum of 8 August 1903 was also reissued. It will be recalled that Malaysia misidentified this map as the original H.O. Chart 2117. This is incorrect. The actual map was H.O. Chart 529, a copy of which appears facing page 123[35]. As can be seen from the legend at the top of the map, it included various boundary limits including those resulting from the 8 August 1903 memorandum. Significantly, none of the proposed boundary lines extended extended Sibutu so as to encompass the islands of Sipadan and Ligitan.

6.41 It is in the light of these developments that the voyage by the *U.S.S. Quiros* in the summer of 1903 needs to be considered. The Department of the Navy was unsure of either the nature or extent of the territorial possessions that it had acquired from Spain, and the voyage of the *Quiros* can be best described as a fact-finding mission. Clearly, Lieutenant Boughter did make various comments regarding what he considered the extent of U.S. sovereignty in the area, but Malaysia provides no indications that this lay within his mandate. The fact that only a few months later the U.S. Secretary of State expressly rejected a "boundary line" that encompassed Sipadan and Ligitan clearly undermines any views that Lieutenant Boughter may have had.

6.42 What cannot be disputed is that the United States never relied on the voyage of the *Quiros* to support a claim to Sipadan and Ligitan. It would have been perfectly possible for the Secretary of State to have formulated a claim to the islands based on the *Quiros'* visit. But he did not do so[36]. Instead, the Secretary of State ordered the earlier version of Chart 2117 showing Sipadan and Ligitan as U.S. possessions to be withdrawn and a new map to be issued. The United States' consistent position was that U.S. possessions in the southernmost reaches of the Sulu Archipelago did not extend beyond Sibutu and its dependencies. No claim to Sipadan or Ligitan was made to Great Britain either in 1903, or in 1907 when a temporary understanding was reached between the two parties, or even in the discussions leading up to the 1930 Convention. For all intents and purposes, the activities of the *Quiros* were completely irrelevant as far as Sipadan and Ligitan were concerned. They certainly cannot be relied on, as Malaysia does, to support the proposition that there was "a vigorous assertion of legal title on the part of the United States"[37].

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[34] MCM, para. 3.20 (footnotes omitted).

[35] This map bears an endorsement dated 1926 from the Library of Congress thus reflecting the fact that the map was considered by the United States accurately to reflect its position well after the events of 1903.

6.43 There is one further issue raised by Malaysia regarding the activities of the *Quiros* which needs to be corrected. In its Memorial, Malaysia drew attention to the fact that on 13 July 1903, the Chairman of the BNBC wrote to the Foreign Office protesting against the actions of the *Quiros*[38]. That letter suggested that, if pressed on the issue by the Foreign Office, the U.S. Government would readily agree to instruct its local officials to remove the flags and tablets they had placed on the islands. Malaysia then asserts that Sipadan and Ligitan were amongst the islands referred to in the BNBC's letter[39]. Based on this line of argument, Malaysia jumps to the following conclusion in its Counter-Memorial:

> "But of course the BNBC was informed about the visit to the islands around Darvel Bay, *including Sipadan*, and protested those as well"[40].

6.44 This contention once again seriously misrepresents the facts. The 13 July 1903 letter did not list the islands to which the BNBC's protest was directed. Instead, it referred back to a dispatch of 22 June 1903 regarding the American occupation of "certain islets". Unfortunately, Malaysia did not annex this document. However, Indonesia has located the document in question and has attached it as Annex 7 to this Reply. It is a very short document from Governor Birch to the BNBC which reads as follows:

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[36] Further evidence showing that the United States did not draw any conclusion with respect to sovereignty as a result of the voyage of the *Quiros* may be found in letters dated 11 March 1904 and 24 April 1904 from the Navy Department and the United States Asiatic Fleet, respectively, in which instructions were explicitly given not to claim sovereignty over any of the islands lying off the coast of Borneo. The letters are at IM, Vol. 3, Annexes 107 and 108.

[37] MCM, para. 3.22.

[38] See MM, paras. 5.31 and Vol. 3, Annex 59.

[39] *Ibid.*, para. 5.32.

[40] MCM, para. 3.23. Emphasis added.

> "American man-of-war paid a visit to the Islands of Bakungan, Taganac, Lankayan, Sibaung, Libiman, and fixed tablets and flags. I am advised by letter to proceed to the east coast. Prompt action is imperative".

6.45 As can be seen, there is no mention of any protest concerning the *Quiros'* actions on Sipadan or around Ligitan, and Malaysia is wrong to suggest otherwise. Moreover, Indonesia is constrained to point out that the *Quiros* did not even visit Sipadan until 22 July 1903, *after* both the 22 June and 13 July letters had been written[41]. To suggest that BNBC officials were protesting about a visit which had not even taken place shows a remarkable degree of prescience on their part.

6.46 In short, there is no evidence of any protest either by the BNBC or the British Government of the action of the *Quiros* around Sipadan and Ligitan. Nor has Malaysia produced any evidence to support the further allegation that "the fact of the BNBC's actual possession of the islands was disputed neither by Great Britain nor the United States"[42]. Quite simply, there was no BNBC "actual possession" of the islands at the time so there was nothing to protest.

C. The 1907 Exchange of Notes

6.47 Malaysia's Counter-Memorial criticises Indonesia for having relatively little to say about the 1907 Exchange of Notes between the United States and Great Britain[43]. In truth, the Exchange is of limited relevance to this case. As Indonesia will presently explain, far from supporting Malaysia's claim that the BNBC was administering Sipadan and Ligitan at the time[44], the evidence shows the contrary. The Exchange of Notes had nothing to do with

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[41] IM, Vol. 3, Annex 101.
[42] MCM, para. 3.23.
[43] *Ibid.*, para. 3.24.
[44] *Ibid.*

Sipadan or Ligitan. It concerned the Turtle Islands and the Mangsee Islands lying far to the north.

6.48 With respect to the question of BNBC "administration" over the disputed islands, Malaysia engages in a classic bootstrap argument. Malaysia has been unable to produce any evidence that prior to 1907 the BNBC had carried out administrative activities on Sipadan or Ligitan. Malaysia thus seizes on the 1907 Exchange and its annexed map to suggest that the Exchange itself is evidence of such administration. But the 1907 Exchange did not indicate that the United States considered itself to be the rightful owner of Sipadan and Ligitan.

6.49 Proof of which islands the United States and Great Britain considered were covered by the administrative arrangements of 1907 is provided by correspondence between the two countries exchanged in connection with the conclusion of the subsequent 1930 Convention. The 1907 agreement recognised that a formal delimitation of each side's territorial possessions was to be deferred for subsequent consideration. On 11 April 1927, the division of Far Eastern Affairs of the State Department sent a letter to the Secretary of State in which the United States' view of the scope of the 1907 Exchange was made clear. The letter stated:

> "In 1907 a temporary agreement was reached between the United States and Great Britain by which the administration of certain islands (*known as the Turtle Islands Group)* located near the north coast of British North Borneo, was left in the hands of British North Borneo Company until the respective governments, by treaty, delimited the boundaries between their respective domains, or until the expiration of one year from the date of a notice of termination. This agreement was made because the United States was not at the time of its conclusion in a position to administer the islands in question"[45].

6.50 Enclosed with this letter was a similar letter from Frank Kellogg to the President of the United States[46]. Both letters made it clear that the islands which had been the subject of the 1907 Agreement were the Turtle Islands which were then being administered by the BNBC. Nowhere was there any suggestion that the 1907 Agreement concerned Sipadan and Ligitan.

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[45] Annex 13 to this Reply. Emphasis added.

[46] *Ibid.*

6.51 Great Britain adhered to the same view. This can be seen from the letter sent by the British Ambassador in Washington to the Secretary of State on 2 January 1930 forming part of the Exchange of Notes regarding the continued administration of the islands in question by the BNBC. It provided:

> "By the convention concluded between the President of the United States of America and His Britannic Majesty for the purpose of delimiting the boundary between the Philippine Archipelago on the one hand and the State of North Borneo which is under British protection on the other hand, the sovereignty over certain islands which have for many years past been administered by the British North Borneo Company has been definitely recognised as pertaining to the United States of America. *These islands which formed the subject of the arrangement effected by an exchange of notes between His Majesty's Government and the United States Government on the 3rd and 10th July 1907, are –*
>
> 1. Sibaung, Boaan, Lihiman, Langaan, Great Bakkungaan, Taganak, and Baguan in the group of islands known as the Turtle Islands.
> 2. The Mangsee Islands"[47].

6.52 Thus, there was agreement by both U.S. and British officials that the subject matter of the 1907 Exchange concerned the Turtle Islands and the Mangsee Islands. Sipadan and Ligitan were not mentioned because there had been no British administration of these islands in 1907 nor any British or American claims to them. The fact that the red line appearing on the map attached to the 1907 Exchange extended to the 4° N parallel of latitude was purely arbitrary and undoubtedly put forward for convenience only. But it in no way created a British administration over the islands that are in dispute in this case where none previously existed. And it certainly did not show, as Malaysia asserts, "that the affected islands were administered by the BNBC"[48]. Not only was the Exchange not published at the time it was entered into, but even if it had been, there would have been no need for a Dutch protest because it did not concern either Sipadan or Ligitan. As has been seen, the Dutch in any event sent a naval vessel to Sipadan and Ligitan in 1921 in a physical display of Dutch sovereignty over the islands[49].

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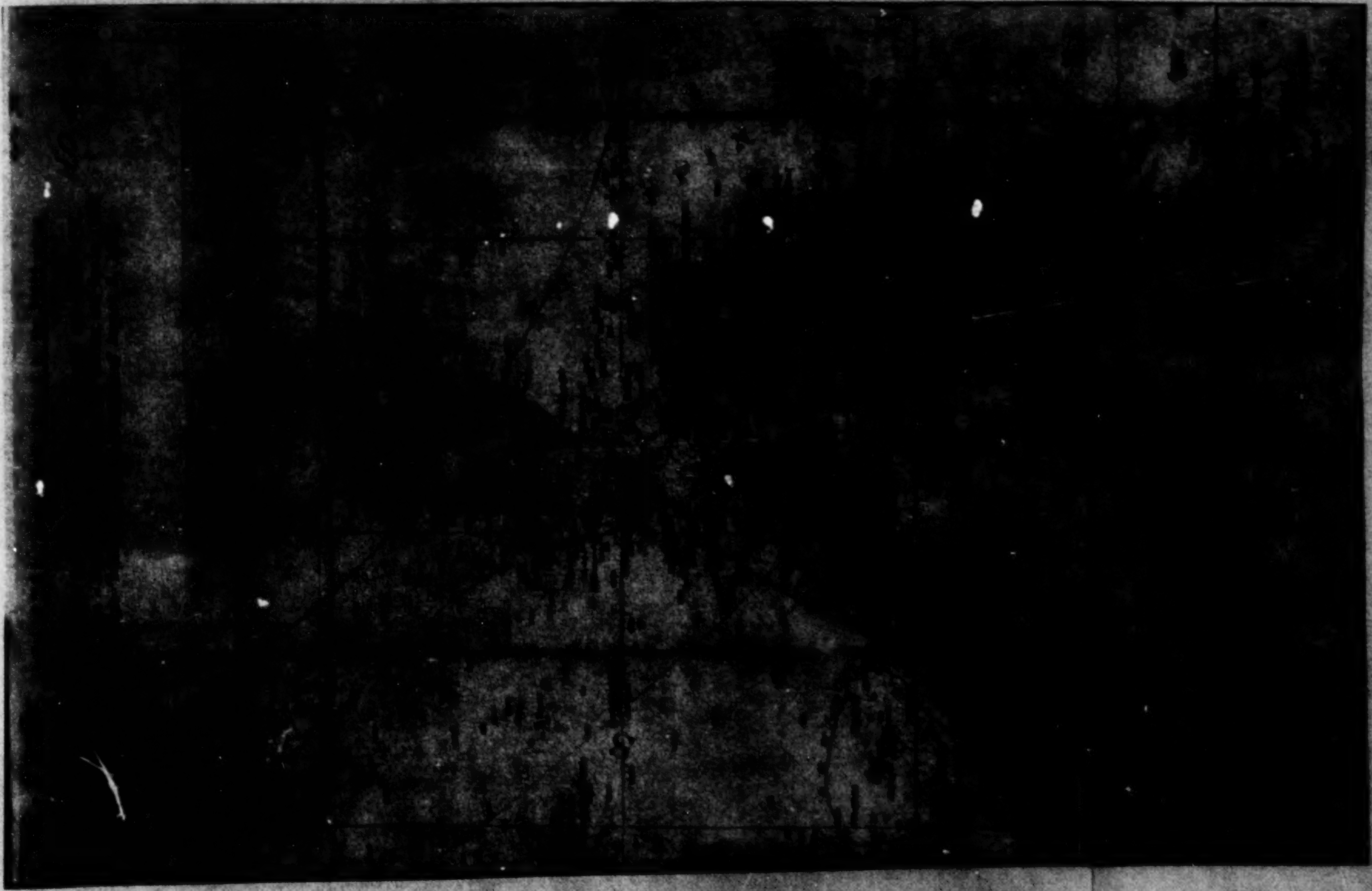
[47] Annex 20 to this Reply. Emphasis added.

[48] MCM, para. 3.24.

[49] See Chapter III, Section 1, above.

Map 9



Map 9

D. The Effects of the 1930 Anglo-American Convention

6.53 The final link in Malaysia's claimed chain of title is the 1930 Convention. Malaysia treats this Convention as if it affected a cession of Sipadan and Ligitan by the United States to Great Britain. But none of the evidence produced in this case even so much as hints that the United States considered that it was ceding anything to Great Britain. Rather, the documentary record shows in the clearest possible terms that the United States only deemed that it had title to islands lying more than three marine leagues from the North Borneo coast in areas lying to the north of Sibutu and its immediate dependencies. As a result, the negotiations between the United States and Great Britain leading up to the conclusion of the 1930 Convention focused solely on the status of the Turtle Islands and the Mangsee Islands.

6.54 Malaysia is forced to concede, as it must, that the southern limits of the boundary fixed by the 1930 Convention lay well to the north of the 4° 10' N latitude and thus well to the north of Sipadan and Ligitan[50]. However, Malaysia invites the Court to read the Convention against the background of the 1903 map and the 1907 Exchange of Notes[51].

6.55 Indonesia has already explained how Malaysia's continued reliance on the 1903 map, as well as the 1907 Exchange, is misplaced. The 1903 map was withdrawn and replaced by maps which either showed no boundary at all encompassing Sipadan and Ligitan or which showed a line which depicted the extent of U.S. territories as lying well to the north. For example, as late as 1926 one may find in the United States records a copy of a map – Hydrographic Office Chart No. 529 – which placed the limit of U.S. possessions along a red line falling three marine leagues from the North Borneo coast well to the north of the two disputed islands. A copy of this map appears facing page 120. Moreover, the 1907 Exchange of Notes had nothing to do with Sipadan and Ligitan as has already been explained. Coupled with the State Department's earlier view that the southwesternmost limit of the possessions acquired from Spain only went as far as Sibutu and its dependencies, this explains why the southwestern limits of the boundary established by the 1930 Convention did not extend to Sipadan and Ligitan.

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[50] MCM, para. 3.25.
[51] *Ibid.*

6.56 Malaysia goes on to argue that the reason why the boundary line stopped at this point was "because there were no islands the United States wished to retain which fell south or west of the 1930 line"[52]. There is no evidence to support this remarkable assertion. Nowhere, either in the Convention itself or in the *travaux préparatoires*, is there any indication that the United States considered that there were islands to which it had a valid claim which it did not wish to retain. It was not as if the 1930 Convention was a compromise with the United States acquiring the Turtle and Mangsee Islands in return for Sipadan and Ligitan. The evidence shows that the British Government never doubted for a moment the right of the United States to the Turtle and Mangsee Islands. The only question that the British Government put forward on behalf of the BNBC was whether the BNBC could continue to administer certain islands in the Turtle Islands group.

6.57 The 1907 arrangement continued to the satisfaction of both the British and U.S. Governments until around 1922, when the U.S. Government, under pressure from the increasingly nationalistic Philippines, indicated that it wished to assume administration over some islands falling to the west of the "Durand line"[53]. Senator Frank B. Kellogg of the U.S. Department of State later wrote to Sir Esme Howard, the British Ambassador to the United States on 21 April 1925:

> "Since it is the desire of this Government to assume at present administration over only the seven islands mentioned in Mr. Lockhart's letter of September 20, 1922, to Mr. Peterson, namely: Boaan, Lihiman, Langaan, Great Bakkungaan, Little Bakkungaan, Taganac and Baguan [*i.e.* the Turtle Islands Group] it would seem preferable to provide for this by a modification of the existing agreement [...]"[54].

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[52] *Ibid.*

[53] See Foreign Office Memorandum dated 13 July 1929 at Annex 16, which states:
"No developments of any particular interest occurred in this matter until 1922, a year in which there was considerable agitation for Philippine independence, which was accompanied by a desire on the part of the Filipinos for the return to the United States, or rather to Philippine jurisdiction, of certain of the islands in dispute. In the same year the United States Government pressed diplomatically for the surrender of seven islands, known locally as the Turtle Islands group".

[54] Annex 12 to this Reply.

6.58 The preferable solution to the issue subsequently appeared to be to settle a final boundary agreement. Hence Senator Frank B. Kellogg's letter to Sir Esme Howard of 20 August 1927:

> "[…] it would be preferable that an agreement be concluded between the United States and Great Britain definitely determining the boundary[…]
>
> The United States is prepared to agree that the boundary between the Philippine Archipelago and British North Borneo be as indicated in red ink on the accompanying charts (Nos. 4707 and 4720, published by the United States and Geodetic Survey) [...]"[55].

A copy of Chart 4707 is at Annex 17 to this Reply (Chart 4720 dealt with the northern sector). It can be seen from the chart that Sipadan and Ligitan, which were not even covered by the chart, were not included within the terms of reference of this agreement for the simple reason that the United States did not consider that they fell within its possessions.

6.59 As to the position of the boundary line proposed in the 1927 letter, Senator Kellogg explained as follows:

> "It will be observed that the boundary now proposed by the United States lies farther from Borneo than does the 'Durand Line', except in the vicinity of the Turtle Islands, and in the portion of the 119th meridian where the two lines coincide.
>
> With respect to the statement in your note under reference, that the British North Borneo Company has a good claim to Great Bakkungaan and Little Bakkungaan Islands, it will be observed that the boundary above described places Little Bakkungaan Island on the British side of the line. With respect to the desire of your Government to obtain for the British North Borneo Company a lease of an area on Taganac Island and certain privileges to insure the operation of the lighthouse now operated by the company on that island, you are informed that the Philippine Government is prepared to take over and maintain the lighthouse, and negotiations to that end would form part of the negotiations looking to the conclusion of the proposed treaty"[56].

6.60 The BNBC raised no objections to the 1927 U.S. proposal[57]. However, it did make a plea that the Turtle and Mangsee Islands should remain under the administrative control of the

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[55] Annex 14 to this Reply.

[56] *Ibid.*

[57] See Memorandum on North Borneo Philippines Boundary at Annex 19.

North Borneo Government, noting the administrative difficulties that would be faced by the Philippines Government if the latter were to assume control over them[58]. The BNBC memorandum dealing with this issue concluded:

> "Finally, the British North Borneo Company submit that it might be possible to persuade the United States Government to adopt a generous view of the matter and either cede these islands to North Borneo or at any rate allow them to remain for a further indefinite period under the jurisdiction of North Borneo; any such cession would naturally be subject to such financial and other terms and conditions as may be agreed".

6.61 This proposal (that the Turtle and Mangsee Islands should be ceded to Britain) was re-stated in a letter from Governor Humphreys to the BNBC President dated 4 February 1929, with an attached memorandum listing the reasons supporting the BNBC's argument[59], and was referred to in the subsequent Foreign Office memorandum dated 13 July 1929. This memorandum reads:

> "While the British North Borneo Company agree that they had no legal title to the Turtle Islands, they hope, for reasons which they fully explain in their memorandum, that the United States Government would permit the Turtle Islands to remain under the jurisdiction of the British North Borneo Company. The Company made no offer in their memorandum to give consideration for this concession on the part of the United States Government, but it is understood that they will be prepared to give some pecuniary compensation if they are permitted to remain in possession of the Turtle Islands"[60].

6.62 However, as explained in the letter dated 6 August 1929 from Sir Esme Howard to Arthur Henderson M.P., the United States Government was under considerable political pressure from the U.S. Senate and from the Philippine Government not to relinquish any territorial possessions in favour of British North Borneo:

> "As regards the proposals in the memorandum the American representatives, while admitting that administration of the islands was easier from Sandakan than from Manila, took that view that cession or sale, and even lease of the islands to North Borneo would present insurmountable difficulties owing to the attitude in such matters

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[58] *Ibid.*
[59] Annex 15 to this Reply.
[60] Annex 16 to this Reply.

of the United States Senate, and also, they led us to believe, to opposition on the part of the Philippine Government"[61].

6.63 As a result of these "insurmountable difficulties", the 1930 Convention left the Turtle and Mangsee Islands to the United States side of the boundary line, and a supplementary Exchange of Notes was used to provide for the continued administration of the islands in question by the BNBC.

6.64 The above analysis demonstrates that from as far back as 1922 the U.S. State Department was under increasing pressure from the Philippine Government to assume administration of islands falling within the territorial limits of the Philippines, to the maximum extent possible, and from both the Philippine Government and the U.S. Senate not to cede or even lease territories that were being administered by the BNBC to Great Britain.

6.65 As a result of this pressure, the United States refused to cede, sell or lease the Turtle and Mangsee Islands to Britain, and consequently it is untenable for Malaysia to suggest that the United States did in fact cede Sipadan and Ligitan to Britain (even supposing that the United States considered that it possessed them). At no point did Great Britain make any reference to the fact that the BNBC administered either Sipadan or Ligitan – for the simple reason that it did not, and at no point did the United States state that it intended to cede Sipadan and Ligitan to Britain – for the simple reason that it did not consider the islands to be its to cede, falling as they did beyond the limits of the Sulu Archipelago.

6.66 States cannot be deemed to have ceded territory to another State absent compelling evidence to that effect. Yet the United States never once raised a claim to Sipadan or Ligitan or suggested that it would be willing effectively to trade these islands for others. Indonesia has placed in evidence, at Annexes 12-20 to this Reply a series of correspondence relating to the 1930 Convention which demonstrates that the negotiation of that Convention involved resolving the situation regarding the Turtle Islands and the Mangsee Islands, both of which ultimately fell on the U.S. side of the boundary established by the 1930 Convention. The Convention did not address islands lying to the south of Sibutu and its dependencies where the United States had no claims.

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[61] Annex 18 to this Reply, at para. 6.

6.67 The Malaysian Counter-Memorial ends its discussion of the 1930 Convention by posing a hypothetical question. If Indonesia is right, asks Malaysia, "what are the consequences for the group of five islands (Kapalai, Danawan, Si Amil, Ligitan and Sipadan) which lie to the south of the 1930 Convention line, but more than 9 n.m. from the coast of Borneo?"[62]. The answer is straightforward. Sovereignty over these islands had been uncertain before the conclusion of the 1891 Convention between The Netherlands and Great Britain. That Convention resolved the issue by allocating to The Netherlands those islands lying south of the 4° 10' N line of latitude. Islands lying to the north of the 4° 10' N line, such as Kapalai, Dinawan and Si Amil, were allocated to Great Britain.

Section 4. Conclusion

6.68 On careful analysis, therefore, it can be seen that each of the links in Malaysia's chain of title is broken. There is no evidence that the Sultan of Sulu enjoyed sovereignty over either Sipadan or Ligitan. Nor is there any evidence supporting a Spanish claim of title to the islands. Finally, the United States never considered that it was sovereign over the two islands, the United States claims being limited in the south to Sibutu and its dependencies. To succeed in its claim, Malaysia bears the burden of proving that, at each step of the process, title vested in the relevant entity, be it the Sultan of Sulu, Spain or the United States. Malaysia has been unable to support any of these propositions standing alone, let alone to all three of them. It follows that Malaysia's claim based on a so-called treaty title must fail.

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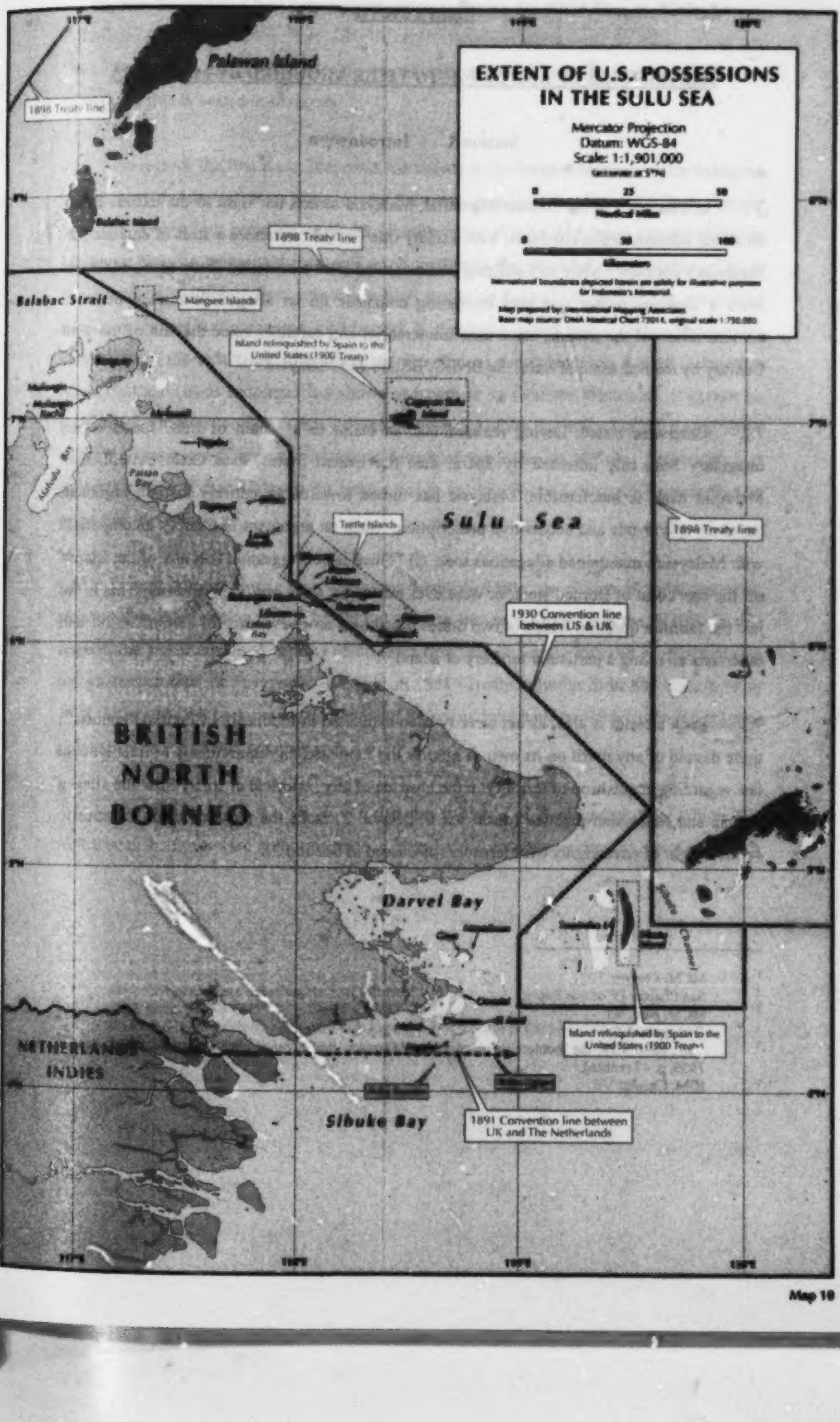
[62] MCM, para. 3.28.


EXTENT OF U.S. POSSESSIONS IN THE SULU SEA
Mercator Projection
Datum: WGS-84
Scale: 1:1,901,000
(accurate at 5°N)
0
25
50
Nautical Miles
0
50
100
Kilometers
International boundaries depicted herein are solely for illustrative purposes for Indonesia's Memorial.
Map prepared by: International Mapping Associates
Base map source: DMA Nautical Chart 73014, original scale 1:750,000
117°E
118°E
119°E
120°E
8°N
7°N
6°N
5°N
4°N
Palawan Island
1898 Treaty line
Balabac Island
1898 Treaty line
Balabac Strait
Mangsee Islands
Island relinquished by Spain to the United States (1900 Treaty)
Cagayan Sulu Island
Sulu Sea
Turtle Islands
1898 Treaty line
1930 Convention line between US & UK
BRITISH NORTH BORNEO
Darvel Bay
Sibutu Channel
Island relinquished by Spain to the United States (1900 Treaty)
NETHERLANDS INDIES
Sibuko Bay
1891 Convention line between UK and The Netherlands

Map 10

CHAPTER VII

THE ABSENCE OF ANY *DE FACTO* TITLE ACQUIRED BY MALAYSIA

Section 1. Introduction

7.1 In Chapter 3 of its Counter-Memorial, Malaysia asserts its "right to the islands based on actual administration combined with a treaty title"[1]. This witnesses a shift of emphasis in Malaysia's position[2]: while still alleging a title derived from a so-called "Sulu title", Malaysia beats a cautious retreat and puts increasing emphasis on an alleged "continual peaceful administration of the islands, since time immemorial and certainly since the end of the 19th Century by the Sultanate of Sulu, the BNBC, Britain and Malaysia"[3].

7.2 Otherwise stated, having realised that its claim to a "chain of title" based on an imaginary Sulu title inherited by Spain, then the United States, then Great Britain, then Malaysia itself is indefensible, Malaysia has turned towards an entirely distinct argument based on *effectivités* and acquisitive prescription. Such an argument is entirely incompatible with Malaysia's maintained allegations that: (i) "There is no suggestion that any of the islands off the east coast of Borneo were, or were ever treated as, *terra nullius*"[4]; and (ii) "This is not just the familiar question which of two States has shown more evidence of administrative and other acts affecting a particular territory or island"[5].

7.3 Such a claim is also, as has already been explained in Indonesia's Counter-Memorial[6], quite devoid of any merit on its own. It ignores the fundamental requirements of international law regarding acquisition of territory in the absence of any historical or treaty title: the alleged British and Malaysian practice (discussed in Section 3) lacks the required characteristics to create a right of sovereignty over territory (discussed in Section 2).

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[1] MCM, Chapter 3.

[2] See Chapter IV of this Reply.

[3] MCM, para. 4.1.

[4] *Ibid.*, para. 3.5.

[5] *Ibid.*, para. 3.29; the footnote referring to the *Minquiers and Ecrehos case, Judgment, I.C.J. Reports 1953*, p. 47 omitted.

[6] ICM, Chapter VII.

Section 2. The Legal Impossibility of Acquiring a *De Facto* Title by Malaysia

7.4 It is useful to recall the legal situation: the basic point being that no original or subsequent title is vested in Malaysia.

7.5 As regards the first issue, Indonesia has shown in its Counter-Memorial[7] that Malaysia has not provided any evidence either of any Sulu title relating to the disputed islands prior to 1891, or of any Sulu presence on them. Furthermore, if there had been any activities on Ligitan or Sipadan before that date, neither of the Parties has provided any evidence of it. It could perhaps be inferred from subsequent facts that some Bajau Laut used to fish around the islands or collect turtle eggs on Sipadan but it should be noted that (i) other populations coming from the east coast of Kalimantan also did so (see paragraph 6.9 of Indonesia's Memorial) and (ii) as Indonesia has shown at length in its Counter-Memorial[8], it cannot be maintained with any conviction that a supposed presence of the Bajau Laut implied any "tie of territorial sovereignty"[9] over the islands in favour of the Sultanate of Sulu. Moreover, it is interesting to note that Malaysia no longer insists on the "Bajau Laut track" which was so present in its Memorial.

7.6 It goes without saying that, absent an established title, the Sultan of Sulu cannot be said to have ceded whatever title he did not possess, either to Spain or to the BNBC. In this respect, the rather confused "chains of title" successively or jointly invoked by Malaysia do not matter: no title, no "cession". Whether in 1851 (Treaty between Sulu and Spain), or in 1878 (Dent and Overbeck grant), the Sultan of Sulu could not have transferred more territorial rights than what he actually possessed.

7.7 By contrast, Indonesia has shown that the Sultanate of Boeloengan, over which The Netherlands had exercised authority since at least 1834[10], extended along the coast of Sibuko

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[7] *Ibid.*, Chapter III; see also Chapter V of this Reply.

[8] ICM, paras. 3.23-3.73.

[9] *Western Sahara Advisory Opinion, I.C.J. Reports 1975*, p. 12 at p. 68, para. 162.

[10] See IM, paras. 4.46-4.71

Bay up to Tawau and Batoe Tinagat[11], and, in accordance with the concept of territory then recognised in the region[12], this territorial authority extended to surrounding islands (and it must be stressed in this respect that Sipadan and Ligitan lie off Sibuko Bay, not Darvel Bay).

7.8 In any event, contrary to Malaysia's assertion, it is not true that "Indonesia's claim to the islands depends on its showing (a) that the Netherlands had, through Boeloengan, a valid claim to the islands before 1891"[13]. As shown in Chapter I, above, the pre-1891 situation is not decisive: the 1891 Convention was concluded precisely with the view to solve definitely the Anglo-Dutch territorial dispute in the area. As was recalled in the Dutch Explanatory Memorandum, the treaty was concluded "in order to achieve a proper boundary settlement between the Dutch territory in Borneo and that of the British protectorate"[14]. And it did – as is explained in Chapter I of this Reply, the 1891 Convention established the course of the dividing line between the Dutch and British possessions in Borneo. As such, it constitutes an indisputable title in favour of each Party to territories lying on each side of the agreed line, "that is, a document endowed by international law with intrinsic legal force for establishing territorial rights"[15]. It is both the "actual source" of the respective rights of the Parties and the evidence of the existence of such territorial rights[16]. Since both Ligitan and Sipadan lie south of the dividing line established by the Convention, they have clearly been allocated to The Netherlands, to which Indonesia is the successor.

7.9 Therefore, the question is twofold: seen from an Indonesian perspective, it is simply a matter of consolidation of title; but as far as Malaysia is concerned, the question is not of consolidation of title, but of acquisition of territory. Whilst, in the first situation *effectivités*, that is "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region"[17], have a purely confirmatory role, in the second hypothesis a complete shift of territorial title from one party (here The Netherlands, then Indonesia) to the other (here, Great Britain, then Malaysia) would be implied. Such a shift cannot be lightly presumed and imposes a much higher burden of proof as Indonesia has shown in its Counter-Memorial[18].

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[11] See, for example, paras. 5.20, 5.24 and 5.36 of this Reply, above.

[12] See IM, paras. 4.6-4.18.

[13] MCM, para. 3.17.

[14] IM, Vol. 3, Annex 77.

[15] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at p. 582, para. 54.

[16] See *ibid*, at p. 564, para. 18; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I.C.J. Reports 1992*, p. 351 at p. 388, para. 45.

[17] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at p. 586, para. 63; see also *Land Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment, I.C.J. Reports 1992*, p. 351 at p. 389, para. 45.

7.10 Related to this is the delicate issue of acquisitive prescription. As Indonesia also noted in its Counter-Memorial, it is highly debatable whether such a concept is generally accepted under international law[19] and Malaysia itself in its Memorial expressly declared that it dismissed such an argument[20]. However, in its Counter-Memorial, Malaysia seems to go back on this imprudent position and makes the argument that The Netherlands and Indonesia acquiesced in "British and Malaysian administration of the islands in the period from 1891 onwards"[21].

7.11 In any case, for Malaysia to acquire a title by means of its alleged *effectivités* would suppose, according to the requirements acknowledged by Namibia in the *Kasikili/Sedudu Island* case, that the following conditions are fulfilled:

> "1. The possession of the […] state must be exercised à titre de souverain.
>
> 2. The possession must be peaceful and uninterrupted.
>
> 3. The possession must be public.
>
> 4. The possession must endure for a certain length of time"[22].

7.12 Moreover, the Court, showed some reluctance in applying the doctrine of acquisitive prescription[23] and seems to have added a fifth condition to the introduction of the doctrine into international law: namely that the claim from the State claiming title be accepted by the other State[24]. This requirement seems to be accepted by Malaysia[25].

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[18] ICM, paras. 7.3-7.14.

[19] *Ibid.*, para. 7.5 and fn. 6.

[20] See MM, para. 6.3.

[21] MCM, para. 3.17, fn. 52.

[22] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J.*, 13 December 1999, para. 94.

[23] *Ibid.*, paras. 96 and 97.

[24] *Ibid.*, para. 98.

[25] See MCM, para. 3.17, fn. 52; see also, para. 7.10, above.

7.13 These strict requirements are necessary in order to maintain legal security and the territorial integrity of States. They are far from satisfied in the present case.

Section 3. The Practice Alleged by Malaysia Lacks the Required Characteristics

7.14 As Indonesia has already recalled[26], Malaysia has not shown evidence of *any* activity of Sulu specifically relating to the disputed islands or even to the adjacent coast at any time before the 1891 Convention.

7.15 As regards the colonial and post-independence periods, Indonesia does not deny that Malaysia can invoke some scanty examples of its or its predecessors' activities on or relating to the islands. However, they did not commence before 1917 and they do not constitute the clear pattern of activities *à titre de souverain* required by international law for acquisitive prescription or, even less, for the transfer of a territorial title. This holds true for:

- the so-called "British administration of the islands";
- the maritime claims in the area; and
- the maps invoked by Malaysia.

A. The So-Called "British Administration of the Islands"

7.16 The acts of administration invoked by Malaysia on the islands are the following:

- the Turtle Preservation Ordinance of 1 June 1917[27];
- the establishment of a bird sanctuary in 1933[28]; and
- the construction and maintenance of lighthouses on the islands in the early 1960's[29].

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[26] See, for example, paras. 5.4-5.13 and 5.25-5.36, above.

[27] MCM, paras. 4.19-4.22.

[28] *Ibid.*, para. 4.23.

[29] MM, paras. 6.25-6.29; MCM, para. 4.24.

Whether taken in isolation or globally, these *effectivités* are not of such a nature as to transfer the territorial title acquired by The Netherlands then Indonesia under the 1891 Convention to Great Britain/Malaysia.

7.17 In respect of the collection of turtle eggs on Sipadan, Malaysia's Counter-Memorial does not add any new elements to those considered in its Memorial. Indonesia has answered them in some detail in its Counter-Memorial[30], to which it would respectfully refer the Court. Indonesia has shown that:

- the Bajau from Dinawan or the Semporna region were not the only people to fish around the islands and collect turtle eggs on Sipadan;
- the British rules were of a more personal than territorial nature; and
- given the particular nature of the area, local people and administrators were probably confused about the exact limits of respective territorial sovereignty over the small uninhabited islands in the region.

7.18 Moreover, Indonesia has shown that Dutch vessels were cruising around the islands, as shown, for example by the 1910 log-book of HNLMS *Koetei*[31].

7.19 Indeed, Malaysia now alleges that "The Netherlands authorities did not react to the duly published Ordinance"[32]. In this regard, it must be recalled that the said Ordinance was published, at least in 1919, in the North Borneo *Official Gazette*. This may make interesting reading, but it can be easily understood that it was not a daily activity of Dutch administrators. Moreover, they had no reason to react since the Ordinance only preserved traditional activities on the island and since fishermen and turtle egg collectors from Indonesia did not face "any problems from anybody" in their traditional activities[33].

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[30] ICM, paras. 7.15-7.35.
[31] See ICM, para. 7.47.
[32] MCM, para. 4.22.
[33] See ICM, para. 7.28.

7.20 In any case, it must be recalled that the 1921 visit of the Dutch destroyer HNLMS *Lynx* to the area shows that the Dutch had a clear convi[illegible]n that Ligitan and Sipadan (and not islands lying north of the 4° 10′ N parallel) were theirs[illegible]his contrasts with the very abstract "*effectivités*" invoked by Malaysia: on the one hand, we have two isolated acts of legislation; on the other, Indonesia has referred to concrete activities manifested by the physical presence of the Dutch navy, as witnessed by the *Lynx* incident and other naval patrols[35].

7.21 It is also significant that Malaysia has failed to produce any actual records of British administration of the islands, even though records were sure to have been kept and Malaysia (and not Indonesia) is well-positioned to have easy access to them. For example, in respect of "the islands which, though on the Philippines side of the boundary [would] continue to be administered by the [BNBC]", the Resident at Sandakan and Kudat was instructed by the BNBC to keep records in respect of "direct revenue derived from these islands", "land affairs" and "any administrative action of particular importance"[36]. It would clearly follow that similar records would have been kept in respect of the islands falling on the British side of the boundary. However, none has been produced in respect of Sipadan or Ligitan, at least prior to 1917.

7.22 Similarly, records relating to the operations of the Borneo Fishing Company on Si Amil run by a Captain Orita indicate that Sipadan and Ligitan did not fall within the area administered by the BNBC. As appears in the annexed notes from the Tawau Resident's Office dating from 1931[37], Captain Orita argued that two such fishing businesses could not be supported in the area around Si Amil, and that he should consequently be granted the sole and exclusive right to collect bait on Si Amil and surrounding islands. However, his application was to collect bait only "on the islands of Kapalai, Danawan, Si Amil, Mabul, Pulau Gaya, Omadal, Pom Pom + Mataking[38], i.e. including all the islands in the area around Si Amil, but not Sipadan and Ligitan. The clear inference from this omission would be that he did not consider these islands as falling with the BNBC's jurisdiction.

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[34] See IM, paras. 3.72-3.74 and 6.2-6.5; ICM, para. 7.51, and paras. 3.2-3.7 of this Reply, above.

[35] See above, paras. 3.2-3.7 and 7.18.

[36] See minute paper from file *North Borneo-Philippines Boundary Treaty (168/30)* from the Tawau Resident's Office archives, dated 28 April 1930, at Annex 21 to this Reply.

[37] Annex 22 of this Reply.

[38] *Ibid.*, para. 11.

7.23 A clear conclusion may be drawn from this situation: to paraphrase the findings of the Arbitral Tribunal in the case concerning the *Laguna del Desierto* between Argentina and Chile:

> "[…] given the nature of the acts which [Malaysia] claims to have carried out in the disputed sector, it would be unreasonable to infer any decisive consequences from the absence of protest on the part of the [Dutch then Indonesian Governments], particularly in view of the confidence which the latter was entitled to place in the [territorial title it held from the 1891 Convention]"[39].

7.24 The same holds true as regards the "notification" of a bird sanctuary in the *Official Gazette* of 1 February 1933[40]. Moreover, as Indonesia noted in its Counter-Memorial[41], the illustrating official British map drawn after this "notification" clearly shows Sipadan lying outside the British administrative boundaries[42].

7.25 As regards the construction and maintenance of lighthouses on Ligitan and Sipadan, it must be recalled[43] that:

- both lighthouses are very light structures made of metal bars;
- Malaysia is most discreet as to the dates and circumstances of their building; and
- "The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty"[44].

7.26 It should also be mentioned that in the region there is at least one clear precedent of such a dissociation between the construction and maintenance of a lighthouse and territorial sovereignty: on 11 April 1927 a letter was sent from the Division of Far Eastern Affairs of the

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[39] *Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy (Argentina/Chile) ("Laguna del Desierto")* ILR 113, p. 79, para. 169. See also case concerning *Kasikili/Sedudu Island, op. cit.*, paras. 98-99 and *Eritrea/Yemen Arbitration, Award of the Arbitral Tribunal in the First State of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, pp. 84-85, para. 315, both of which are referred to at ICM, paras. 7.26-7.27.

[40] MM, Vol. 4, Annex 101.

[41] ICM, para. 7.37.

[42] MM, Map 13 of the Map Atlas.

[43] ICM, paras. 7.39-7.43.

[44] *Eritrea/Yemen Arbitration, Award of the Arbitral Tribunal in the First State of the Proceedings (Territorial Sovereignty and Scope of the Dispute), op. cit.*, p. 87 at para. 328.

U.S. State Department to the Secretary of State, to which a letter from Frank Kellogg to the U.S. President was attached. In the latter letter Frank Kellogg referred to the fact that the Turtle Islands, which were then *de facto* administered by the BNBC (see paragraph 6.49, above), fell under U.S. sovereignty and noted that the United States "would agree (1) to permit the British North Borneo Company to operate a lighthouse which the Company had erected on Taganac Island, one of the islands of the Turtle Group"[45]. Even though it seems that the matter was not followed up, this at least shows that both Britain and the United States shared the conviction that building and operating lighthouses is not necessarily linked to State sovereignty. Moreover, it is Indonesia's understanding that Malaysia's case in its dispute with Singapore concerning Pulau Pisang (Pedra Branca) is that this small island in the Singapore Straits is under Malaysian sovereignty although the lighthouse on it was erected and is maintained by Singapore.

7.27 In the same vein, but more generally, another fact is striking: most of the *effectivités* invoked by Malaysia, and particularly the Turtle Preservation Ordinance of 1 June 1917 relate to the period between 1917 and 1930. Given the important change in Malaysia's argument (see Chapter IV, above), this point is of some importance.

7.28 The Parties now agree "that Sipadan and Ligitan fell outside the terms of the Sulu grant of 1878 because they were outside the 9 nautical mile line"[46]. This means that, the scanty activities conducted in relation to the islands by the BNBC, consequently Great Britain, before the alleged "relinquishment" of sovereignty by the United States to Great Britain, were performed without any valid title. In other words, the BNBC and Great Britain merely (and scarcely) acted as an "occupier without a title" (*occupant sans titre*). All these pre-1930 acts were therefore by definition *not* acts of an authority in exercise of rights of sovereignty, and consequently they can have no legal effect to confirm or indeed to establish title, which Malaysia concedes Great Britain did not possess.

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[45] P. 3 of Frank Kellogg's letter to the U.S. President at Annex 13 to this Reply; see also the Foreign Office Memorandum dated 13 July 1929 at Annex 16 and para. 3 of the Exchange of Notes between Sir Esme Howard, the British Ambassador in Washington, and Mr. Stimson, the U.S. Secretary of State, dated 2 January 1930 at Annex 20.

[46] MCM, para. 3.6.

7.29 When these few irrelevant acts are discounted (which, from a legal perspective, they must be), the so-called "British administration" of the islands is reduced to virtually nothing and is certainly incapable of creating any territorial title.

B. The Irrelevance of Maritime Claims in the Area

7.30 In its Counter-Memorial, Malaysia again harps on the fact that Indonesia, in promulgating a system of straight baselines in its internal legislation (Act No. 4 of 1960), did not use Sipadan or Ligitan as basepoints[47]. Malaysia even goes so far as to try to elevate this alleged "practice" on the part of Indonesia to an element partaking of the definition of *uti possidetis*[48].

7.31 Malaysia's arguments are based on a clear double standard. While Malaysia criticises Indonesia for not including the two islands in its original system of straight baselines, Malaysia passes over in silence the fact that it, too, did not use either Sipadan or Ligitan as basepoints for its own maritime claims until well after the dispute had emerged between the Parties in 1969.

7.32 Indonesia has fully explained in its Memorial the circumstances in which Act No. 4 was enacted in 1960[49]. Indonesia in fact neglected to use a whole series of islands for its archipelagic baseline claim in this legislation. A number of such islands were subsequently recognised by Malaysia to fall under Indonesian sovereignty and as appropriate basepoints.

7.33 As for Malaysia's own conduct, it will be recalled that, prior to the negotiations between the Parties in September 1969 during which Malaysia laid claim to Sipadan and Ligitan for the first time, Malaysia had itself enacted legislation governing its territorial sea and contiguous zone. This was Ordinance No. 7 of 2 August 1969, a document which surprisingly Malaysia has not seen fit to annex to its written pleadings[50].

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[47] MM, paras. 4.25-4.31.

[48] *Ibid.*, para. 4.25.

[49] IM, paras. 8.10-8.12 and see the affidavit prepared by Admiral Sumardiman on this issue (IM, Vol. 5, Annex B).

[50] A copy of this law may be found at IM, Vol. 4, Annex 137.

7.34 Article 3 of Ordinance No. 7 established the breadth of Malaysia's territorial sea as twelve nautical miles. There was no suggestion that such a territorial sea applied to the islands of Sipadan or Ligitan. Instead, Article 5 of the law stipulated that "[s]o soon hereafter as may be possible" Malaysia would issue a large-scale map indicating the low-water mark of its coast, its baselines and the outer limits of its territorial waters. Article 5 went on to provide that a copy of such map would be published in the Malaysian *Gazette*.

7.35 No such map was published at that time. Indeed, it was not until 1979, ten years after this dispute had arisen, that Malaysia issued a map which, for the first time, included Sipadan and Ligitan within Malaysia's maritime claims. Prior to 1979, Malaysia's maps had repeatedly depicted the 4° 10' N line extending east of the Island of Sebatik as the limit of its jurisdiction.

7.36 The 1979 map was promptly protested by Indonesia not simply as an encroachment on Indonesia's territory and sovereign rights, but also as a fundamental violation of the *status quo* arrangement agreed between the Parties during their 1969 negotiations[51]. Indonesia has already commented on the fact that a fundamental and self-serving change in one party's official cartography after a dispute has emerged constitutes a compelling ground for disregarding such subsequent practice[52].

7.37 It can thus be seen that neither Indonesia's Act No. 4 nor Malaysia's Ordinance No. 7 have any real bearing on the case. What is relevant, on the other hand, is the pattern of conduct engaged in by *both* Parties before the dispute emerged – and by Malaysia in the ten year period after the dispute had arisen – which consistently treated the 4° 10' N line as a dividing line extending out to sea to the north of the islands. This conduct has been reviewed in Chapter III above.

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[51] In contract to Malaysia's self-serving activities with respect to the disputed islands, Indonesia has scrupulously respected the *status quo* agreement.

[52] IM, paras. 8.59-8.69.

C. The Maps Invoked by Malaysia

7.38 In its Memorial and Counter-Memorial Malaysia has invoked a number of maps which it claims support its position.

7.39 Indonesia has already commented fully on the maps relied upon by Malaysia in its Memorial: see paragraphs 7.70 to 7.93 and the Map Annex of Indonesia's Counter-Memorial. As regards the further maps submitted by Malaysia with its Counter-Memorial, Indonesia has commented on them individually at the Map Annex attached to this Reply. Suffice it at this stage to posit a few general conclusions regarding the map evidence invoked by Malaysia in these proceedings in alleged support of its position.

7.40 Firstly, the map evidence submitted by Malaysia is characterised by significant omissions. Thus, whereas Indonesia has been able to point to maps that clearly show that the parties to the 1891 Convention intended that the agreed line should extend offshore[53], Malaysia has provided no evidence to the contrary. This conclusion is fully supported by the Dutch Explanatory Memorandum Map which was known to and acquiesced in by the British[54], providing strong evidence that it was the contemporaneous intention of both Dutch and British parties to the 1891 Convention that the 4° 10' N line should continue eastwards of Sebatik.

7.41 Second, Indonesia has assembled a number of maps prepared by Edward Stanford, the BNBC official cartographer, on which a red dotted line was plotted along the 4° 10' N parallel after, but not before, 1891, reflecting the clear understanding on the part of the BNBC that the Convention line represented the limits of its jurisdiction. Malaysia has adduced no maps that demonstrate the contrary. Malaysia has adduced some maps on which no offshore boundary is indicated (for example the Dutch 1913 map of the Southern and Eastern Division of

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[53] See IM, paras. 5.20 and 5.23(a); ICM, paras. 5.70 *et seq.*

[54] See paras. 2.30-2.32, above.

Borneo[55], the 1913 Dutch map of the Administrative Structure of the Southern and Eastern Borneo Residence[56] and the 1906 Stanford map[57]). However, if these maps are considered in any detail it is readily apparent that the maps were only intended to depict boundaries on the mainland of Borneo. This is especially true with maps prepared by the Netherlands East Indies Topographical Office where standard practice was not to depict offshore boundary lines.

7.42 As regards the other maps adduced by Malaysia, dating from the later colonial and post-colonial periods, they are discussed individually in the Map Annexes to Indonesia's Counter-Memorial and this Reply. In this section it needs only to be recalled that, as explained elsewhere, these maps are contradictory and support neither the alleged Spain-United States-Great Britain chain of title[58], nor Malaysia's assertion that the islands have been continually administered by Malaysia or its predecessors in title since the end of the 19th century (or indeed before).

7.43 Malaysia places great emphasis on the map attached to the 1915 Convention. However, as explained at paragraphs 2.42-2.47 above, neither the Convention, the map attached to it, or the 1913 Commission had any bearing with regard to the boundary east of Sebatik Island.

7.44 Malaysia appears to contend that a number of maps support its position for the simple reason that no offshore line is depicted on them. However, Malaysia misses the point: such maps are inconclusive for the simple reason that they do not attribute the islands lying east of Sebatik to one party or the other; they are entirely neutral. Moreover, these maps are greatly outweighed by the large number of maps discussed in Chapter III, on which the 4° 10' N Convention line is consistently depicted as continuing out to sea.

7.45 To conclude, whereas the maps relied upon by Malaysia do not support either of the central elements of its case, Indonesia has adduced a significant body cartographical evidence

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[55] MM, Map Atlas, Map 1.
[56] MCM, Insert 11.
[57] MM, Map Atlas, Map 6.
[58] In respect of the U.S. H.O. Chart 2117, so heavily relied upon by Malaysia, which was in fact expressly withdrawn upon the Secretary of State's instructions, see paras. 6.28-6.39, above.

which demonstrates that before, during and after the conclusion of the 1891 Convention, the parties to the Convention clearly intended that the 4° 10' N Convention line should continue offshore, and that this understanding has been consistently reflected in subsequent maps prepared by both sides throughout the 20th century.

SUBMISSIONS

On the basis of the considerations set out in this Reply, the Government of the Republic of Indonesia requests the Court to adjudge and declare that:

(a) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and

(b) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia.

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Dr. N. Hassan Wirajuda

Agent of the Republic of Indonesia

MAP ANNEX

COMMENTS ON MAPS SUBMITTED WITH MALAYSIA'S COUNTER-MEMORIAL

1. In the Map Annex to Indonesia's Counter-Memorial, the maps submitted by Malaysia with its Memorial were discussed individually. Malaysia has since submitted a number of further maps, the relevance of which Indonesia will rebut here.

Section 1. Discussion of Individual Maps

A. Survey Map of Netherlands East Indies Archipelago (1897-1904), Topographical Bureau at Batavia[1]

2. With regard to this map, Malaysia states, that "the detail on the map is sufficiently clear to show the land boundary coming in from the west to cross the island of Sebatik and terminating at its east coast. There is no extension seaward. The orange line represents the district boundary. The small dots or crosses that appear in the sea just east of Sebatik are sandbanks and reefs. The map carries no suggestion of the existence of any Dutch claim to sovereignty over any islands east of Sebatik"[2].

3. However, upon close examination of the map annexed by Malaysia in Volume 2 of its Counter-Memorial (the colouring of the extract at Insert 10 is somewhat distorted), it can be seen that the red boundary line does not terminate at the east coast of Sebatik, but continues seaward, gradually merging into the orange line that continues through the Celebes Sea. Although it is unclear from the map whether the line falls to the north or south of Sipadan and Ligitan, it is clear that it was understood that the boundary line which divided Sebatik Island should continue eastwards out to sea beyond the eastern limit of the island.

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[1] MCM, para. 5.13, Insert 10 and Vol. 2, Map 1.

[2] *Ibid.*, para. 5.13.

B. 1905 and 1915 Nautical Charts of the East Coast of Borneo[3]

4. Malaysia has further annexed two nautical charts of the east coast of Borneo, apparently incorporating information gathered in a survey by the Dutch ship, the *Macasser*.

5. As stated in Indonesia's Counter-Memorial[4], there is clear authority for the position that nautical charts are generally prepared for shipping purposes only, and that any boundaries indicated are to be accorded no significance. The only possible significance of these charts is that they appear to confirm that Dutch ships (the *Macasser* in particular) did carry out surveying operations in the area around Sipadan and Ligitan, which attracted no protest from the British.

C. Map Accompanying Government East Indies 1913 Formal Decision on the Administrative Structure of the Southern and Eastern Borneo Residence[5]

6. This map shows what appears to be a boundary line, marked in red, extending along the 4°10' N parallel across Sebatik Island until the eastern terminus (no legend is marked on the extract reproduced by Malaysia). The islands of Sipadan and Ligitan are not marked.

7. However, it should be noted that a number of other islands were also not marked on this map, for example Pulau Pandjang, Pulau Maratoea and Pulau Kakaban[6], islands lying off the Batoe headland in an area covered by the map and which were indisputably Dutch. The map is consequently quite inconclusive as regards sovereignty over any of the Dutch islands.

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[3] *Ibid.*, para. 5.14 and Vol. 2, Maps 2 and 3.

[4] ICM, Map Annex, paras. A.4-A.5.

[5] MCM, para. 5.15 and Insert 11.

[6] These islands are marked on the 1913 Netherlands Indies map at MM, Map Atlas, Map 1.

D. Sheet NA-50, "Oost Borneo" compiled and printed by the Topografische Dienst, Batavia in 1935[7]

8. Malaysia considers the "particular significance" of this map being that part of the mainland of Dutch Borneo is depicted beyond a "border break" at the top of the page, but a similar break had not been added to include the islands of Sipadan and Ligitan.

9. Malaysia states that that the "border break" had been added "in order to complete the coverage of Dutch territory without publishing the next adjacent sheet to the north". No basis for this speculative statement is given – the reasoning is entirely self-serving. The only relevant point is that the area in which Ligitan and Sipadan fell was not included within the page frame. The map cannot be regarded as conclusive as to territories not covered by its scope.

E. Map 25 of Atlas of the Tropical Netherlands Prepared by the Royal Geographical Society of The Netherlands with the Topographical Service of the Netherlands East Indies, published in 1938[8]

10. On this map an insert of the town of Balikpapan has been imposed over the area off Semporna in which Sipadan and Ligitan lie. Malaysia seems to infer that this has been done intentionally as an indication that the islands were not regarded as Dutch. However, this is pure conjecture, the relevant point being that the map does not show the area including the islands in question. Indonesia further points out that other small Dutch islands are not shown on the map, e.g. Pulau Raboe Raboe, Pulau Derawan and others lying off the Batoe headland. The failure to include small islands within the scope of the map can thus have no bearing as to their sovereignty.

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[7] MCM, para. 5.16, Insert 9 and Vol. 2, Map 5.

[8] *Ibid.*, para. 5.17, Insert 12 and Vol. 2, Map 6.

F. Sheet Noord (North) B-50, "North Borneo", Produced by the Topografische Dienst, Batavia in 1941[9]

11. Malaysia's main point regarding this map is that since Sipadan and Ligitan are followed by the letter "I" (for "island"), and not preceded by the letter "P" (for "Pulau"), they are being designated as British rather than Dutch.

12. This flimsy reasoning is unsupported by any legend, and is undermined by the fact that Sebatik is also preceded by the letter "P" even though half of it was British. Indonesia would also point out that these terms have been used inconsistently elsewhere, such as on the Stanford maps discussed in Chapter IV, where the islands lying off the Dutch coast are alternately designated "Island" and "Pulo".

13. It should also be pointed out that no indication for the source of this map has been given. It was prepared during the Second World War, shortly before the Japanese occupation of Indonesia. Given its secret status and the wartime circumstances of its production, it would be inappropriate to draw any conclusions regarding sovereignty from it.

G. Map "Kalimantan Utara", from the International Map of the World Series, Jakarta, 1965[10]

14. Malaysia notes that this map was a copy of the 1941 map, discussed above, with the salient difference being that the border across Sebatik has been extended out to sea, although not as far as Sipadan and Ligitan.

15. However, Malaysia fails to acknowledge the significance of this line; it clearly reflects an understanding that the boundary line extended seawards along the 4° 10' N parallel. It should also be noted that the border between the Philippines and Sabah is similarly only depicted by a broken line.

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[9] *Ibid.*, para. 5.18, Insert 13 and Vol. 2, Map 7.

[10] *Ibid.*, para. 5.26, Insert 14 and Vol. 2, Map 8.

H. 1968 Edition of "Kalimantan Utara"[11]

16. This map, also from the International Map of the World Series, is almost identical to the 1965 map of "Kalimantan Utara", discussed above. Again, the important point of the map is that it shows the border between Malaysia and Indonesia extending seawards along the 4° 10' N parallel.

17. This is confirmed by the General Map of the area depicted next to the legend (at Map 9, not reproduced by Malaysia in Insert 15). On this map, the seaward boundary is indicated by a continuous line extending well to the east of the area encompassing the islands. Although the scale of this map is far too small to indicate the islands, this line shows quite clearly an understanding that the boundary between Indonesia and Malaysia extended eastwards from Sebatik Island.

I. 1976 Edition of Sheet NB 50, "Bandar Seri Begawan", Printed in 1977[12]

18. Malaysia focuses on the extract of this map, prepared after this dispute crystallised, which it has reproduced as Insert 16 on which the offshore boundary line between Indonesia and Malaysia is not depicted.

19. However, Malaysia has ignored the small map of the "Administrative Area", next to the legend reproduced at Map 10 and not on the insert, which shows the international boundary clearly: it is represented by a continuous line that extends seawards along an approximation of the 4° 10' N parallel from Sebatik Island well beyond the islands in dispute.

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[11] *Ibid.*, para. 5.27, Insert 15 and Vol. 2, Map 9.

[12] *Ibid.*, para. 5.28, Insert 16 and Vol. 2, Map 10.

J. "Sibatik Land Systems and Land Suitability", Produced Jointly by U.K. and Indonesian Land Evaluation Authorities in 1987[13]

20. Malaysia then exhibits a map, drawn up well after this dispute crystallised for use in land systems and suitability analysis, which bears the disclaimer, "This map must not be considered an authority on the delineation of international and other boundaries".

21. The map, which is of a limited part of north-east Borneo, does not appear to extend as far eastward as Sipadan and Ligitan, which are not marked. However, the map does show the international boundary line extending eastwards from Sebatik Island along the 4° 10' N parallel. Malaysia provides no explanation for this line. It would clearly seem to reflect an understanding that the 4° 10' N boundary adopted in the 1891 Convention extended out to sea.

K. Map of Kalimantan, 1992[14]

22. Finally, Malaysia has introduced a commercially produced map, dating from well after the crystallisation of this dispute, on which a line is drawn continuing eastwards from Sebatik Island, although following a course that appears to lie slightly south of the 4° 10' N parallel.

23. The map clearly was not intended to be relied upon for geographical accuracy - a number of small islands are not marked (including Sipadan and Ligitan), and no indication is given for the position of the red line. However, the map gives the clear impression that some sort of boundary line ran eastwards from Sebatik Island. The only possible explanation for this line is that it approximated to that adopted in the 1891 Convention, as is marked on numerous other maps.

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[13] *Ibid.*, para. 5.29 and Vol. 2, Map 11.

[14] *Ibid.*, para. 5.30, Insert 17 and Vol. 2, Map 12.

Section 2. Conclusions

24. In the body of this Reply, Indonesia has discussed the significance of the maps submitted in the course of these proceedings which support Indonesia's position[15]. As Indonesia has shown, there is a substantial body of map evidence, whether dating from around the time of the 1891 Convention or subsequently in the colonial and post-colonial periods which shows clearly that both Parties and their predecessors in title have consistently understood that the 4° 10' N line agreed upon the 1891 Convention extended out to sea, thereby serving as a line of allocation in respect of Sipadan and Ligitan (and other islands in the area).

25. To the contrary, the maps relied upon by Malaysia in support of its position are inconclusive. In respect of those maps submitted with Malaysia's Memorial, Indonesia refers to the comments contained in the Map Annex attached to its Counter-Memorial. As regards the further maps submitted with Malaysia's Counter-Memorial, as has been shown in this Map Annex, they are either quite inconclusive, or, in fact, support Indonesia's position.

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[15] See Chapter III, Section 5 of this Reply; see also IM, paras. 6.30-6.79, ICM, paras. 7.70-7.93 and Map Annex.

CERTIFICATION

I have the honour to certify the accuracy of the translations into English made by Indonesia which appear in the Reply and its Annexes. I also certify that the documents annexed are true copies and conform to the original documents.

…………………………………

Dr. N. Hassan Wirajuda
Agent of the Republic of Indonesia

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)

REPLY

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Volume 2
(Annexes)

2 MARCH 2001

Annex 1

AANTEEKENINGEN OMTRENT DE NOORDOOSTKUST VAN BORNEO
(NOTES CONCERNING THE NORTH-EAST COAST OF BORNEO)
BY H. VON DEWALL,
FROM *TIJDSCHRIFT VOOR INDISCHE TAAL-, LAND- EN VOLKENKUNDE*, DEEL IV, NIEUWE SERIE, DEEL I, 1855, PAGES 423-427,
WITH ENGLISH TRANSLATION

AANTEEKENINGEN

OMTRENT DE

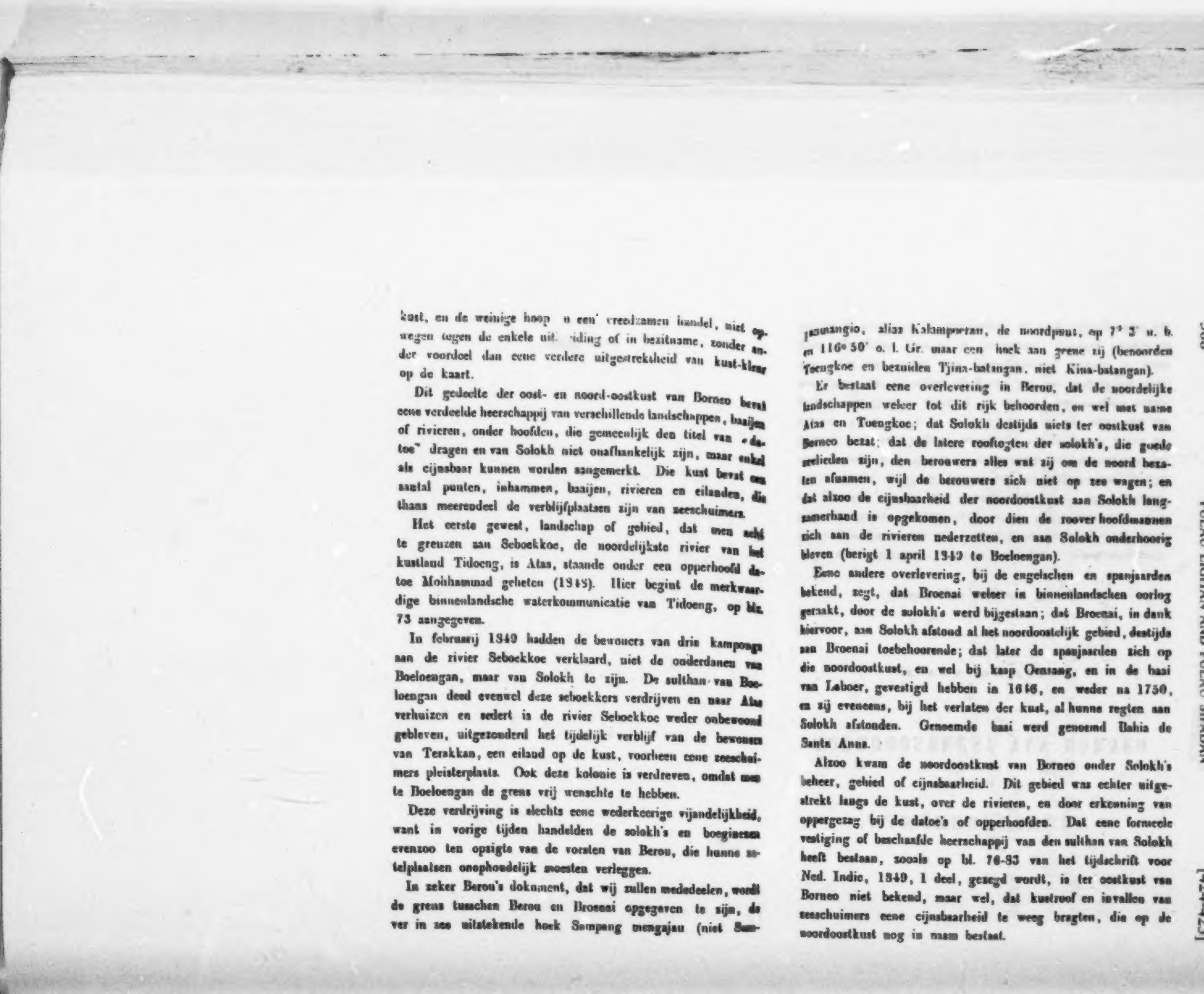
NOORDOOSTKUST VAN BORNEO

VAN

H. VON DEWALL.

Landschappen beoorden Tidong.

Zoo als op bladz. 73 hiervoren is opgegeven, wordt het noordelijkste grenspunt voor de nederlandsche bezittingen ter oostkust van Borneo bepaald op 4° 21′ n. b. Er bestond in 1849 een gevoelen, om dit punt te stellen op 5° 40′ (de Sandakanbaai), of wel op 6° 23′ (Paitan-baai of Soegoet-rivier), omdat deze geheele kust slechts in naam onder de cijnsbaarheid van Solokh staat, en, volgens bewering, vroeger onder Beroe behoorde. Op 6° 25′ n. b. en 117° 45′ o. l. Gr. acht men het gebied van Broenai aanvang te nemen. Als vroegere onderhoorigheid van Beroe en op grond van den afstand der oostkust door de vorsten van Bandjermasin, bestond er alzoo geen tegenspraak voor de in bezitname. Evenwel konden de daaruit te voorziene verwikkelingen, de verre afgelegenheid der



kust, en de weinige hoop op een' vreedzamen handel, niet opwegen tegen de enkele uitbreiding of in bezitname, zonder ander voordeel dan eene verdere uitgestrektheid van kust-kleur op de kaart.

Dit gedeelte der oost- en noord-oostkust van Borneo bevat eene verdeelde heerschappij van verschillende landschappen, baaijen of rivieren, onder hoofden, die gemeenlijk den titel van „datoe" dragen en van Solokh niet onafhankelijk zijn, maar enkel als cijnsbaar kunnen worden aangemerkt. Die kust bevat een aantal punten, inhammen, baaijen, rivieren en eilanden, die thans meerendeel de verblijfplaatsen zijn van zeeschuimers.

Het eerste gewest, landschap of gebied, dat men acht te grenzen aan Seboekkoe, de noordelijkste rivier van het kustland Tidoeng, is Atas, staande onder een opperhoofd datoe Mohhammad geheten (1848). Hier begint de merkwaardige binnenlandsche waterkommunicatie van Tidoeng, op blz. 73 aangegeven.

In februarij 1849 hadden de bewoners van drie kampongs aan de rivier Seboekkoe verklaard, niet de onderdanen van Boeloengan, maar van Solokh te zijn. De sulthan van Boeloengan deed evenwel deze seboekkers verdrijven en naar Atas verhuizen en sedert is de rivier Seboekkoe weder onbewoond gebleven, uitgezonderd het tijdelijk verblijf van de bewoners van Terakkan, een eiland op de kust, voorheen eene zeeschuimers pleisterplaats. Ook deze kolonie is verdreven, omdat men te Boeloengan de grens vrij wenschte te hebben.

Deze verdrijving is slechts eene wederkeerige vijandelijkheid, want in vorige tijden handelden de solokh's en boeginezen evenzoo ten opzigte van de vorsten van Berou, die hunne zetelplaatsen onophoudelijk moesten verleggen.

In zeker Berou's dokument, dat wij zullen mededeelen, wordt de grens tusschen Berou en Broenai opgegeven te zijn, de ver in zee uitstekende hoek Sampang mengajau (niet Sampanmangio, alias Kalamporan, de noordpunt, op 7° 3' n. b. en 116° 50' o. l. Gr. maar een hoek aan gene zij (benoorden Toengkoe en bezuiden Tjina-batangan, niet Kina-batangan).

Er bestaat eene overlevering in Berou, dat de noordelijke landschappen welcer tot dit rijk behoorden, en wel met name Atas en Toengkoe; dat Solokh destijds niets ter oostkust van Borneo bezat; dat de latere rooftogten der solokh's, die goede zeelieden zijn, den berouwers alles wat zij om de noord bezaten afnamen, wijl de berouwers zich niet op zee wagen; en dat alzoo de cijnsbaarheid der noordoostkust aan Solokh langzamerhand is opgekomen, door dien de roover hoofdmannen zich aan de rivieren nederzetten, en aan Solokh onderhoorig bleven (berigt 1 april 1849 te Boeloengan).

Eene andere overlevering, bij de engelschen en spanjaarden bekend, zegt, dat Broenai welcer in binnenlandschen oorlog geraakt, door de solokh's werd bijgestaan; dat Broenai, in dank hiervoor, aan Solokh afstond al het noordoostelijk gebied, destijds aan Broenai toebehoorende; dat later de spanjaarden zich op die noordoostkust, en wel bij kaap Oensang, en in de baai van Laboer, gevestigd hebben in 1646, en weder na 1750, en zij eveneens, bij het verlaten der kust, al hunne regten aan Solokh afstonden. Genoemde baai werd genoemd Bahia de Santa Anna.

Alzoo kwam de noordoostkust van Borneo onder Solokh's beheer, gebied of cijnsbaarheid. Dit gebied was echter uitgestrekt langs de kust, over de rivieren, en door erkenning van oppergezag bij de datoe's of opperhoofden. Dat eene formeele vestiging of beschaafde heerschappij van den sulthan van Solokh heeft bestaan, zooals op bl. 76-83 van het tijdschrift voor Ned. Indie, 1849, 1 deel, gezegd wordt, is ter oostkust van Borneo niet bekend, maar wel, dat kustroof en invallen van zeeschuimers eene cijnsbaarheid te weeg bragten, die op de noordoostkust nog in naam bestaat.

In 1762 stond de engelsche Oost-indische kompagnie den sulthan van Solokh bij tegen de spanjaarden, die genoemden vorst te Manila gevangen hielden. Den 6 october 1762 werd hij door de engelschen bevrijd. Uit dank hiervoor stond de sulthan aan de engelschen af alle regten van Solokh op de noordoostkust van Borneo. Hiervan werd echter geen ander gebruikt gemaakt, dan om het eiland Balambangan, op de noordkust gelegen, in bezit te nemen, en het blijkt niet, dat de door den sulthan van Solokh overgedragen regten op de genoemde kust, eenige bekrachtiging, erkenning of nederzetting hebben ten gevolge gehad. Denkelijk was de overrompeling en de verdrijving der engelschen van Balambangan, op den 5 december 1775, hiervan een der redenen of oorzaken, te meer daar het zelfs niet blijkt, dat laatstgenoemde verdrijving immer is gewroken geworden.

Van Toengkoe, dat vroeger onder Derou behoorde, vernemen wij uit de reis van Belcher in 1845, dat aldaar een der voornaamste slavenmarktplaatsen is. Deze plaats ligt aan eene baai, op de kaarten geheeten Giong-baai, bezuiden kaap Oensang, wier ligging op 5° 20′ n. b. en 119° 22′ o. l. wordt geschat, zullende Toengkoe, bij gelijke breedte, eene aardrijkskundige lengte hebben van 118° 20′. De zeeschuimers genieten hier eene ongestoorde rust, want de kust wordt, om de afgelegenheid, weinig bezocht. Een ander hoofdkwartier der zeeroovers is te Tambisan benoorden kaap Oensang, bij een eilandje van dien naam, dat met de kust eene ruime baai vormt, en alwaar de markt is der oorlogsbehoeften, hier aangebragt door boeginezen van Singapoera.

Omtrent het niet verder eijnalbaar maken der kusten beneden Toengkoe, vernemen wij, uit de aanteekeningen van een ooggetuige, op 23 april 1849, te Sesajap, eene kampong van 30, digt aan elkander staande huizen, op den regteroever der Sebauwang, 1/2 mijl boven de monding van het onbewoonde riviertje Sesajap, het volgende:

Voor 30 of 40 jaren stond de genoemde kampong nog aan de monding van de Mendjelattoeng, 1½ mijl van de tegenwoordige standplaats, en op den linker oever der Sebauwang. Alstoen werd deze plaats aangevallen door eenige groote solokhsche en illanonsche zeerooversprauwen. Die van Sesajap verdedigden zich echter zoo lang en dapper, tot dat er hulp van Boeloengan kwam, en de solokh's met groot verlies moesten afdeinzen. Sedert zijn geene solokhsche roovers meer in de Sebauwang rivier gekomen, en alleen komen daar handelaars, die was, vogelnestjes en padi uitvoeren, en zout, tabak, lijnwaden, gezouten visch en olie aanbrengen. Zoo lagen er den 19 april 1849 drie solokhsche praauwen-bintak, in de Kajan-monding Salembatoe; echter is de regtstreeksche handel tusschen Solokh en Tidoeng verboden en alles gaat over Boeloengan. Alleen om de twee of drie jaren komen praauwen van het noordwaarts gelegene landschap Atas in de Sebauwang ten handel. Zij brengen droogevisch, klappers, lijnwaden en zout, en ruilen dit voornamelijk tegen padi. Atas levert ook vogelnestjes, die evenwel door de solokh's afgehaald worden.

Een ooggetuige verzekert, dat in het landschap van Tjinabatangan, om de noord, olifanten en tijgers worden gevonden, en van die streken veel ivoor wordt uitgevoerd. Bezuiden voornoemd landschap worden geene olifanten of tijgers aangetroffen. Deze zonderlinge natuurkundige omstandigheid heeft ter oostkust van Borneo nog eene wederga. In Koetei, op den linker Mahakkam-oever en om de noord, worden orang-oetan's gevonden; bezuiden dien stroom en van den regter oever af, geen enkele meer.

Tidoeng.

Dit kustland komt op oude kaarten voor als verbrokkeld in

INFORMAL TRANSLATION

From: *Tijdschrift voor Indische Taal-, Land- en Volkenkunde*
Deel IV. Nieuwe Serie, Deel I. 1855.
At pp. 423-427.

NOTES

concerning the

NORTH-EAST COAST OF BORNEO

by

H. VON DEWALL

Regions north of Tidoeng.

As is stated on page 73 above, the most northern point of the boundary for the Dutch possessions on the eastern coast of Borneo is fixed at 40° 21' N. latitude. There was a sentiment in 1849 to fix this point at 5° 40' (the bay of Sandakan), or indeed at 6° 25' (bay of Paitan or the river Soegoet), as the whole of this coast comes under the tributary control of Solokh in name only, and is alleged to have formerly belonged to Berou. At 6° 25' N. Latitude and 117° 45' Eastern longitude Gr. the territory of Brunei is deemed to begin. As a former dependency of Berou and on account of the cession of the east coast by the princes of Bandjarmassin, there was thus no contest to the occupation. However the entanglements that were to be foreseen from that, the far remoteness of the coast, and the little hope for a peaceful trade, could not counterbalance the single expansion or occupation, without other gain than a further expanse of coastal colour on the map.

This part of the east and north-east coast of Borneo contains a divided rule over different regions, bays or rivers, by chiefs, who usually have the title of "datoe" and who are not independent of Solokh, but can only be considered to be tributary. This coast contains a number of places, inlets, bays, rivers and islands, that are now largely the abode of pirates.

The first province, region or territory, that is deemed to border upon Seboekkoe, the most northerly river of the coastal territory Tidoeng, is Atas, under the rule of a chief named datoe Mohammed *(1845)*. Here starts the noteworthy inland water communication of Tidoeng, indicated on page 73.

In February 1849 the inhabitants of three kampongs along the river Seboekkoe declared themselves not to be the subjects of Boeloengan, but of Solokh. The sultan of Boeloengan however had these Seboekkans expelled and removed to Atas and since then the river Seboekkoe has remained uninhabited, with the exception of the temporary stay of the inhabitants of Terrakan, an island on the coast, in former times a haunt of pirates. This colony has also been expelled, as in Boeloengan one wanted the border to be free.

This expulsion is only a reciprocal hostility, for in earlier times the people from Solokh and the Bugi acted in the same manner towards the princes of Berou, who had to move their seats of government constantly.

In a certain document from Berou, that we shall produce, the border between Berou and Brunei is stated to be the corner Sampang mengajau, that juts out far into the sea (not Sampanmangio, otherwise known as Kalampoeran, the northern tip, at 7°3' North latitude and 116°50' East longitude Gr., but a corner on the other side (north of Toengkoe and south of Tjina-batangan, not Kina-batangan)).

Tradition in Berou has it that the northern regions of old belonged to this realm, and particularly Atas and Toengkoe; that Solokh at that time possessed nothing of the east coast of Borneo; that the later raids of the people of Solokh, who are accomplished seamen, took away from the people of Berou all that they possessed in the north, since the people of Berou do not venture upon the sea; and that thus the status of the north-east coast, of being tributary to Solokh, has arisen, because the robber-chieftains settled at the rivers, and remained subordinate to Solokh (notice April 1st 1849 at Boeloengan).

Another tradition, known to the English and Spaniards, has it that Brunei, in olden times drifted into internal warfare and was aided by the people from Solokh; that Brunei, to return the favour, ceded all of the north-eastern territory, that at that time belonged to Brunei; that later the Spaniards settled at that north-east coast, indeed at cape Oensang, and at the bay of Laboer, in 1646, and again after 1750, and that they also, on leaving the coast, ceded all of their rights to Solokh. This said bay was named Bahia de Santa Anna.

Thus the north-east coast of Borneo came under the control of Solokh. However this territory was extensive along the coast, across the rivers, and by acknowledgement of supreme authority with the datoes or chieftains. That a formal establishment or civilized rule by the sultan of Solokh has existed, as is stated on pages 76-83 of the journal of the Netherlands Indies, 1849, 1 volume, is not known on the east-coast of Borneo, but it is known that the coastal plunder and raids of the pirates brought about a status of being tributary, that still nominally exists on the north-east coast.

In 1762 the British East-Indian Company aided the sultan of Solokh against the Spaniards, who held the said prince prisoner in Manila. On the 6th of October 1762 he was liberated by the British. Out of gratitude the sultan ceded all rights that Solokh held to the north-east coast of Borneo, to the British. This led to no other use of the situation though, other than the occupation of the island of Balambangan, that is situated on the north coast, and it does not appear that the cession by the sultan of Solokh of the rights to the said coast brought about any sanction, acknowledgement or settlement. Probably the surprise attack and the expulsion of the British from Balambang, on December 1775, is one of the reasons or causes hereof, the more so as it does not even appear that the last-mentioned expulsion ever has been avenged.

We learn from the journey of Belcher in 1845 that at Toengkoe, formerly a possession of Berou, is situated one of the most important slavemarkets. This place is situated on a bay, called the bay of Giong on the maps, south of cape Oensang, that lies according to estimates at 5° 20' North latitude and 119° 22' East longitude, so that Toengkoe, having the same latitude, will have a geographical longitude of 118° 20'. The pirates here enjoy an undisturbed peace, for the coast, because it is so isolated, is visited little. Another headquarters of the pirates is at Tabisan north of cape Oensang, near an small island of that name, that together with the coast forms a large bay, and where there is a market of war-materials, brought here by the Bugi rom Singapore.

Regarding the fact that the coasts south of Toengkoe were not being made to be tributary, we learn from the notes of an eye-witness, on April 28th 1849, at Sesajap, a kampong of 30 houses standing closely together, on the right bank of the Sebauwang, ½ mile above the mouth of the uninhabited small river Sesajap, the following:

About 30 or 40 years ago the said kampong was still located at the mouth of the Mendjelattoeng, 1.5 miles away from the present location, and on the left bank of the Sebauwang. Then this place was attacked by pirates in some large proas from Solokh and Illanon. The people from Sesajap defended themselves for such a long time and so bravely, till help arrived from Boeloengan, and the pirates from Solokh had to withdraw with great loss. No Solokh robbers have come to the Sebauwang river since, and only traders come, who export wax, bird's nests and paddy, and bring salt, tobacco, linens, salted fish and oil. Thus on April 19th 1849 three proas-bintak from Solokh lay in the mouth of the Kajan, Salembatoe; but is it forbidden to trade directly between Solokh and Tidoeng and everything is conducted by way of Boeloengan. Proas from the northern region of Atas come to trade in the Sebauwang only every two or three years. They bring dried fish, coco-nuts, linens and salt, and exchange this chiefly for paddy. Atas also supplies bird's nests, however they are taken away by the people from Solokh.

An eye-witness assures us that in the region of Tjinabatangan, in the north, elephants and tigers are to be found, and that from that area a lot of ivory is exported. South of this said region no elephants or tigers are found. This remarkable physical circumstance is matched on the east coast of Borneo. In Koetei, on the left bank of the Mahakkam and in the north, orang-outangs are to be found; south of that river and away from the right bank there is no longer a single one.

Annex 2

LETTER FROM SIR RUTHERFORD ALCOCK, BRITISH NORTH BORNEO COMPANY TO SIR JULIAN PAUNCEFOTE, FOREIGN OFFICE DATED 11 JANUARY 1884, WITH ENCLOSURES

No. 1.

Sir R. Alcock to Sir J. Pauncefote.—(Received January 12.)

Dear Sir Julian, *11, Old Broad Street, London, January 11, 1884.*

THE inclosed letters from North Borneo bearing directly upon the question of the disputed Dutch boundary are important, as showing that the Dutch men-of-war are cruizing in our waters, north of the boundary they themselves claim, viz., Batu Tinagat.

I send these copies to you privately, hoping you will find an early opportunity of putting Lord Granville in possession of the contents, in connection with my last official on this subject. I cannot help thinking it would be very desirable, even as regards the probability of an early settlement of this vexed question, if one of our ships-of-war, surveying or other, could be sent and kept for some time in the North Borneo waters, and as Admiral Dowell is about to proceed to take command on the China Station, might not a word be said to him before he leaves.

Yours, &c.

(Signed) RUTHERFORD ALCOCK.

Inclosure 1 in No. 1.

Governor Treacher to Sir R. Alcock.

Sir, *Sandakan, November 22, 1883.*

REFERRING to previous correspondence, I have the honour to report that on the 3rd instant I visited the Island of Omaddal and several other Bajow villages in that neighbourhood, accompanied by the Acting Resident of the east coast, Mr. C. A. Bampfylde, and by the magistrate in charge of Darvel Bay. At a somewhat crowded meeting at Omaddal sufficient evidence was given to show that a Dutch war vessel had been cruizing in our waters, north of the boundary they themselves lay claim to, viz., Batu Tinagat. I inclose copy of statement taken down by Mr. Bampfylde as to the seizure by the Dutch of a native boat. I am satisfied in my own mind that the occupants of the boats referred to in the statement were pursuing their lawful avocations. The testimony of the villagers as to the action of the Dutch appears to be unanimous. I trust you will see that justice is done to the subjects of the Company in this matter.

The value of the boat seized with its contents appears to amount to about 70 dollars.

2. The natives of Pulo Gaza and the other villages all complain that for some time past they have been afraid to pass Batu Tinagat on their pearl shell, tortoise-shell and trepang fishing excursions, as if seen by the Dutch they are invariably chased and seized if overtaken. The trade of Silam is affected by this action of the Dutch authorities. I have recommended the people to apply to the magistrate at Silam for North Borneo flags and for passes when going on their expeditions in future.

3. I should be the last to underrate the good work done by the Dutch cruizers in suppressing piracy and slavery on their east coast; but the people I refer to are not pirates or slave-dealers, and the boat in question was seized in North Borneo and not in Dutch waters. The Island of Mabul is marked on the Admiralty chart.

I have, &c.

(Signed) W. H. TREACHER.

Inclosure 2 in No. 1.

Statement of Si Biraham relative to the Seizure by the Dutch of Native Boats from Omaddal.

NOT quite a month ago I and a party of Omaddal people in a "sapit" (native prahu) and two "dapangs" (outrigged boats) were fishing for "trepang" off Mabul Island. We were anchored at the time, when we saw a Dutch man-of-war bearing down upon us; we then made off, being frightened. The ship did not fire but lowered boats, and these followed us; the boats fired five times with rifles, but the bullets did not reach us. We got ashore on Mabul Island and ran inland, where we remained two days and one night, when we ventured out, but found the man-of-war still there, and bearing down on the island: we then seized one of the boats and made for Omaddal. When we left the two "dapangs" and the "sapit" were still on the beach (explains there were three "dapangs" and not two). We did not see the man-of-war take our boats. The man-of-war was three-masted and under steam. I saw her lower one row-boat. In my "sapit" I had my wife, three sons and three daughters, and in the "dapangs" there were five people. I had on board ten "bubu," 60 catties "trepang," value about 10 dollars, and the "sapit" was worth 150 catties of brass guns (say at 40 cents), equal 60 dollars.

Taken at Omaddal on the 3rd day of November, 1883.

(Signed) C. A. BAMPFYLDE,
Acting Resident of the East Coast.

At Kopang, the people said that from Sipanggaw village the man-of-war had been seen steaming away with a "sapit" in tow, but with no "dapangs."

C. A. B.

Annex 3

MANUSCRIPT COPY OF DISPATCH FROM SIR HORACE RUMBOLD TO THE MARQUIS OF SALISBURY, DATED 26 JANUARY 1892, WITH RECEIPT SLIP

The Hague
January 26. 1892

9

My Lord,

With reference to my despatch No. 156 of the 14th of October last on the subject of the North Borneo Boundary, I have the Honour to transmit, herewith, to Your Lordship two copies of a map which has lately been published in the official journal showing the boundary line

as

Marquis of Salisbury K.G.

2 - 1028 f

as agreed upon under the late Convention together with the boundaries which had been previously proposed.

This Map forms part of a Report presented to the Second Chamber of the States General by a Committee appointed to examine the agreement concluded last year by the Governments of Great Britain and the Netherlands

The map seems to be the

only

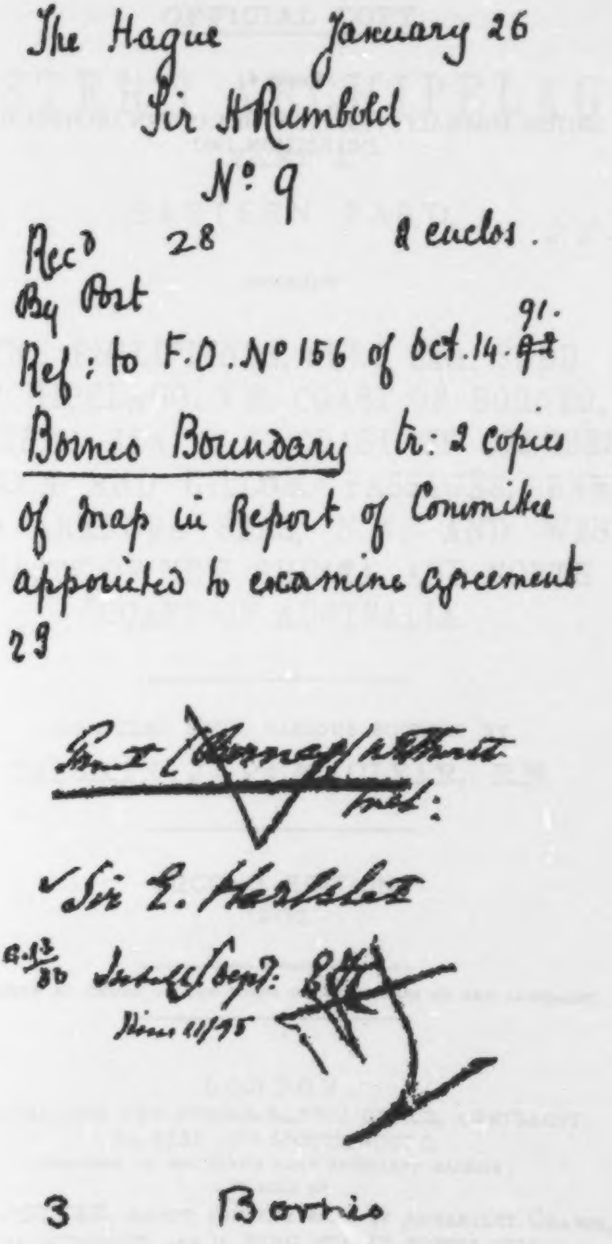
only interesting feature of a document which does not otherwise call for special comment.

I have the Honour to be with the highest respect, My Lord,

Your Lordship's,

Most obedient, humble Servant.

Horace Rumbold



The Hague January 26

Sir H Rumbold

Nº 9

Recd 28 2 enclos.

By Post

Ref: to F.O. Nº 156 of Oct. 14. ~~92~~ 91.

Borneo Boundary tr: 2 copies of map in Report of Committee appointed to examine Agreement

29

~~Print [illegible] w Hertslet~~

Intd:

✓ Sir E. Hertslet

G. 13/80 Library Dept: E.H.

[illegible] 11/95

3 Borneo

Annex 4

BRITISH ADMIRALTY PILOT FOR THE EASTERN ARCHIPELAGO, 2ND EDITION, 1902

OFFICIAL COPY.

EASTERN ARCHIPELAGO,

PART I.

(EASTERN PART),

882/

COMPRISING

THE PHILIPPINES, SULU SEA, SULU ARCHIPELAGO, N.E. COAST OF BORNEO, CELEBES SEA, N.E. COAST OF CELEBES, MOLUCCA AND GILLOLO PASSAGES, BANDA AND ARAFURA SEAS, N.W. AND WEST COASTS OF NEW GUINEA, AND NORTH COAST OF AUSTRALIA.

COMPILED FROM VARIOUS SOURCES BY

CAPTAIN J. P. MACLEAR, R.N.

SECOND EDITION,
1902.

PUBLISHED BY ORDER OF THE LORDS COMMISSIONERS OF THE ADMIRALTY.

LONDON:
PRINTED FOR THE HYDROGRAPHIC OFFICE, ADMIRALTY,
BY EYRE AND SPOTTISWOODE,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;
AND SOLD BY
J. D. POTTER, AGENT FOR THE SALE OF ADMIRALTY CHARTS,
145, MINORIES, AND 11, KING STREET, TOWER HILL.

1902.

Price Four Shillings.

from the above survey of the *Nassau*, with additions from the surveys of the Spanish Government, published in the Derrotero of 1879 and its annual supplements. Horsburgh's Directory, the Nautical and Mercantile Magazines, and the Remark Books of H.M. ships have also been consulted.

The Sailing Directions for Balábac strait and the channels between Paláwan and Borneo, and part of the north-east coast of Borneo, including Mallawallé channel, are from the surveys of Staff-Commander Reed and the officers of the *Rifleman*, 1868–1870; for the north-east coast of Borneo and off-lying islands and reefs and Sandakan harbour, from the surveys of H.M. ships *Samarang*, 1844–1849, *Nassau*, 1871–1872, *Flying Fish*, 1881, *Magpie*, 1883, and *Rambler*, 1889. The coast to the southward of Unsang peninsula, including Darvel bay, Sibuko bay, the Sibutu islands and reefs, and the Ligitan islands and reefs, were surveyed by H.M.S. *Egeria*, 1891–92.

The Sailing Directions for the Moluccas have been compiled mainly from Horsburgh's Directory and the "Molukscbe Archipel," with additions from the voyage of the *Challenger*, the Remark Books of officers of H.M. ships *Serpent* and *Nassau*, and the surveys of H.M.S. *Flying Fish*, 1885; from Wallace's "Malay Archipelago" and the "Cruise of the *Marchesa*," Findlay's Sailing Directions for the Indian Archipelago, the French "Instructions Nautiques sur le Grand Archipel d'Asie," and the Nautical and Mercantile Marine magazines have also been consulted.

The Sailing Directions for the Banda and Arafura seas have been compiled from Horsburgh's Directory, the "Molukscbe Archipel," "Voyages through the Moluccan archipelago and to New Guinea," by Lieut. Kolff, of the Dutch navy, and from the surveys of H.M. ships *Challenger*, 1874, and *Flying Fish*, 1885.

The Sailing Directions for the north-west and west coasts of New Guinea are from Horsburgh's Directory, Findlay's "Indian Archipelago," 3rd Edition, Kolff's "Voyage through the Moluccan Archipelago and to New Guinea," the "Molukscbe Archipel," the "Cruise of the *Marchesa*," and from the Hydrographic notices issued by the Admiralty.

No connected survey has been made of these coasts; our knowledge of them is derived from many isolated expeditions touching at various points, and the longitudes of the principal points are open to great doubt. The north coast of Waigiu island was surveyed by Captain Forrest in 1775, and by D'Urville in 1827; Dampier strait and the north coast of New Guinea was explored by Dampier in 1700, and McCluer in 1791; later additions to our knowledge have been made by Sir E. Belcher in 1840, Captain Moresby in 1875, and the U.S. sloop *Alert* in 1877. Battanta and Salwatti islands are known from the "Cruise of the yacht *Marchesa*" in 1883. Selé strait was explored by Signor Cerruti in 1870, and the German frigate *Gazelle* in 1875. McCluer inlet was mapped by McCluer in 1791, Segaar and Patippi bays by the officers of the German vessel of war *Gazelle* in 1875. Alexandra and Freshwater bays were examined by Signor Cerruti and Captain di Lenna in 1870. Kamrau bay was explored by the Dutch steamer *Etna* in 1857. The coast from Triton bay to Prince Frederick Henry island was explored by Lieut. Kolff in 1825, Lieut. Modera in 1828, Lieut. Kool in 1835, and by D'Urville in 1839. Besides the above, many scientific expeditions have been sent by the Dutch Government.*

The Sailing Directions for the North coast of Australia are from the survey by Captain Stokes, R.N., 1838–1842, already published in Australia Directory, Vol. III., and from the late surveys of Popham bay, cape Don, and Clarence strait by Captain Maclear, R.N., 1885, and of port Darwin by Commander Hoskyn, R.N., 1885.

The first edition was compiled in 1890, by Captain J. P. Maclear, R.N., from various sources, an account of which has been given above. The present edition, prepared by Captain John Phillips, R.N., contains all the information received since 1890, including especially the remarks of Commander A. M. Field, R.N., H.M.S. *Egeria*, employed surveying on the north-east coast of Borneo, 1891–92, and much useful information furnished by Naval Officers of the United States relating to the coasts and ports of the Philippine islands.

Seamen are invited to transmit to the Secretary of the Admiralty notice of any errors or omissions they may discover, or additional information they may obtain, with a view to the improvement of this work and for the benefit of the mariner.

By the publication of this work, the former edition, as well as Supplements, or Hydrographic Notices relating to them, also Notices to Mariners up to and including No. 371 of 1902, are cancelled.

W. J. L. W.

Hydrographic Office, Admiralty, London.
July 1902.

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* A complete paper on the Progress of Discovery on the coasts of New Guinea, with Bibliographical index, was published in 1884 by the Royal Geographical Society. *See* Supplementary papers, Vol. I., part 2.

has a summit near its centre 280 feet high. The main entrance to the Kumpong river is on the eastern side of the island; the narrow channel separating Kumpong Kumpong island from the mainland on the western side nearly dries at low water.

Saddle hill.—Westward of Kumpong Kumpong island a low mangrove shore trends to the westward for 8½ miles to a coast ridge named Saddle hill, the eastern hump of which is 330 feet, and the western 450 feet in height.

Kumpong river.—There is not more than 3 or 4 feet water on the bar of this river at low water, but within the entrance the river has depths of 2 and 3 fathoms. On entering it appears a fine broad river with two branches, uniting at 2½ miles from its mouth and enclosing a long narrow island.

The river was ascended by the steam cutter of the *Egeria* for 8 miles from the mouth, at which point the water was brackish. Further progress was barred by the banks narrowing, and by the interlacing of the foliage overhead, but there was still a depth of 2 fathoms water. Two branches of the river taking a southerly direction were also explored, both ending similarly in deep narrow creeks.

The mangrove ceases at 4 miles from the mouth; higher up the banks are clothed with nipa palms, with occasionally a red earthy bank appearing on one side and swamp on the other. The river is singularly free from snags or obstructions of any kind. From the topography of the country it must drain a considerable area. There were no signs of inhabitants.

Mount Pöck, 1,860 feet high, is the summit of the ranges on the eastern side of the valley of the Kumpong river, and is the westernmost peak of a mountainous range extending north-east and south-west about 6 miles northward of Delconte point, and separated from the mountains immediately behind that point by a deep valley.

Mount Wüllerstorf, rising 17 miles W. ¼ S. from mount Sinalong, is 2,500 feet in height with a conical summit, and standing 10 miles from the coast forms one of the most conspicuous mountains on the northern side of Sibuko bay. It falls steeply to the eastward to the plains below, but a range of mountains from 2,000 to 1,600 feet high stretches N.N.W. from it between which and the low spurs of the mountains to the eastward is a valley 7 miles wide through which the Kumpong river takes its course. The entire district is covered with extensive forest.

LIGITAN ISLANDS are a group of islets and reefs lying on the north coast of Sibuko bay, extending over a distance of 16 miles, east and west, from Si Amil to Mabul island, and separated from the Beaufort

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See chart, No. 1,651 [2,611].

and Creagh reefs by the Ligitan channel. The area included within the limits of this group comprises on its eastern side an extensive reef, roughly triangular in shape, on the northern end of which stands Danawan island.

From Danawan island the reef extends in a south-south-easterly and southerly direction for 10 miles, projecting to the eastward with shallow water half a mile outside the edge of the reef on which the sea breaks heavily, and along which there are tide rips and overfalls. The water in the vicinity being considerably discoloured and the examination of the edge being somewhat of an open nature, the reef should not be approached very closely.

A patch, with a depth of 2¾ fathoms, is reported to lie half a mile to the southward of the south-east extremity of the reef in lat. 4° 7½′ N., long. 118° 55¾′ E.

Si Amil island, the north-easternmost island of the group, situated 8¾ miles S.E. from Omadal island, is half a mile in diameter, 355 feet high, and thickly wooded. On its western side there is a sandy spit, and off the north-west point a reef extends for 2 cables leaving a passage 2 cables wide between the reefs of Si Amil and Danawan islands. The island is uninhabited, and uncultivated except for numerous mango trees in the valley on the west side.

Danawan island stands near the northern point of the main reef, half a mile south-westward of Si Amil; it is low, wooded and flat-topped. On the western side there is a village, and yams, sweet potatoes, mangoes, and bananas are cultivated, but the island is only accessible by boats on the eastern side where the reef closely approaches the shore.

On the eastern side of Danawan there is a bay in the reef protected by Si Amil island, but the water is deep, there being 30 fathoms midway between the two islands; anchorage, however, can be obtained in a depth of 16 fathoms at 1½ cables from Danawan.

Ligitan islet, 1½ miles from the south-east point of the main reef, and 9 miles S. ½ E. from Si Amil island, is small, and but 30 feet in height; there are a few bushes on it. A sand bank that dries 3 feet lies 2¾ miles northward of the islet.

Tidal streams and rips.—Off the southern end of the reef the streams run from 2 to 3 knots, causing very heavy overfalls and tide rips; caution should therefore be exercised in approaching this end of the reef, especially as the marks for fixing the position are distant.

Foul ground.—From its southern extremity the edge of the reef turns sharply to the northward, leaving Ligitan island half a mile to the eastward, and then turns sharply again to the westward for 7 miles, thus forming a deep bight which ends at the south-west point of the reef. Foul ground and shallow water extend westward for 2½ miles from the

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See chart, No. 1,681 [2,611].

south-west point, and, as it does not generally break over the edge, which falls very steeply down into deep water, the danger limit cannot always be distinguished. From the south-west point the edge of the reef trends away north-eastward to Danawan island.

Cust reef, awash at low water, is 1½ miles in length east and west; its north point lies 5½ miles N. 56° E. from Mabul island. Several little detached patches lie about a quarter of a mile off the northern side of this reef, which therefore should not be approached closely, nor on passing it should the water be shoaled to less than 10 or 12 fathoms.

South-east of Cust reef, and separated from it by a narrow channel, is a larger reef 2½ miles long, east and west, and one mile in breadth, the edge of which has not been closely examined, but it appears to be foul to a distance of half a mile from the reef on all sides. The channel eastward of this reef, between it and a projecting spur of the main reef, is 2 miles wide, but although no detached patches were actually found in it, yet the survey of this portion of the group was of too general a character to justify vessels venturing in this channel or the other passages between the reefs.

Mabul island, the westernmost of the Ligitan islands, lies 15 miles W. by S. ½ S. from Si Amil; it is small and densely wooded, the tree tops being 160 feet high, and stands near the northern end of Mabul reef, which extends three-quarters of a mile southward from the islet.

The passage between Mabul reef and Kapalai reef to the south-east is 2 miles wide, with 4 to 5 fathoms on either side, and 6½ fathoms in a narrow channel in the middle. Nothing less than 4 fathoms has been found on either side of the channel (except close to the reefs), but the examination has not been sufficiently exhaustive to determine that there is not a less depth, and therefore it would be well to use Mabul passage on the west side of Mabul island in preference.

Kapalai islet is a small sandy islet with trees on it 40 feet high, lying 3½ miles S.E. by E. ¾ E. from Mabul islet, and standing on the north eastern part of a detached reef situated midway between Mabul islet and the south-west point of the main reef.

The passage between Kapalai reef and the foul ground off the south-west point of the main reef is 1¼ miles wide, but is obstructed in the middle by a patch of 5 fathoms, and it is possible that there may be other patches with less water.

Mabul passage, westward of Mabul islet, is the channel between the Ligitan group to the eastward and Ligitan reefs to the westward. It is 3½ miles broad, but is obstructed in the middle by a bank with 3¾ fathoms on it; on the eastern side of the passage there is another bank with a depth of 4½ fathoms. The deepest part of the passage lies between these two banks, and carries a depth of 7 to 8 fathoms right through.

See chart, No. 1,681 [2,611].

Mount Sidougal (on the eastern extreme of Timbu Mata island) in line with the west extreme of Sipangao island bearing N. 5° W., leads through Mabul passage and to the westward of Collins patch..

Collins patch, lying 1⅓ miles N.W. by W. ½ W. from Mabul island, is a small coral head with a depth of 2¾ fathoms, rising from a narrow bank of sand and coral extending within 10 fathoms limits for a distance of 2 miles N.W. by N. and S.E. by S. Another coral patch on the same bank with 4¾ fathoms on it lies three-quarters of a mile N.W. by W. ¾ W. from Mabul island.

Caution.—Collins bank should not be crossed by a ship unless there is some necessity for it, as the soundings on it are uneven, and it is possible that other shallow spots may exist, notwithstanding that it has been examined somewhat closely.

LIGITAN CHANNEL, between the Ligitan group on the south and Creagh and Beaufort reefs on the north, is 18 miles in length in an E. by N. and W. by S. direction, and varies in width from 1½ miles at its western entrance, between Gusungan islet and the projecting horn of the easternmost Ligitan reef, to 6 miles abreast of Si Amil island.

The depths in the eastern part are from 11 to 14 fathoms, and further to the westward there are 18 to 20 fathoms, shoaling again to 11 and 12 fathoms at the western entrance. Except Collins patch, already mentioned, no dangers have been discovered in the channel except close to the edges of the reefs, but north, north-east, and north-west of Mabul island the ground is very uneven and rocky, and such being its character, the shoaler parts of the banks shown on the charts should be avoided if possible.

Tidal streams.—In Ligitan channel the flood stream runs to the southward and westward, and the ebb stream to the northward and eastward, with a strength of one to 1½ knots per hour at springs.

On one occasion whilst the *Egeria* was at anchor during two days at spring tides, with high winds, in the Mabul passage the tidal streams were observed to set as follows :—

At moon's superior transit . .	Slack water.
At 3h. after " " .	N.N.E. max. velocity 1·2 knots
At 6h. " " " .	E.N.E.
At 9h. " " " .	E.S.E.
At 12h. " " " .	S.S.E.
At 15h. " " " .	S.S.W. max. velocity 0·9 knots.
At 18h. " " " .	S.W.
At 21h. " " " .	S.W.
At 24h. " " " .	N.W. gradually changing to north.

This feature of a circular tide once in 24 hours was not observed elsewhere.

See chart, No. 1,631 [2,611].

Sipadan islet, situated 7½ miles South from Mabul island, is a small wooded islet, 165 feet high to the tops of the trees, standing on the north-west side of a reef one mile long north and south with 40 to 50 fathoms close to the reef, dropping into depths of over 300 fathoms at one-third of a mile from the islet. Turtle frequent this islet in considerable numbers.

LIGITAN REEFS are a series of detached reefs, with shoal water between them, fronting the north coast of Sibuko bay at a distance of 4 to 5 miles from the shore; from Mabul passage they extend a distance of 9 miles to the westward. On the south side of these reefs the bank on which they stand drops steeply down into deep water.

The north extreme of Silungan island in line with the summit of a mountain above Delconte point bearing N. 70° W. leads north-east of Ligitan reefs.

Near the middle of the Ligitan reefs there is a break in their continuity 2 miles wide, and through the western side of this opening there is a channel, which although not closely examined, appears from the soundings to be navigable.

Erzherzog reef, west of Ligitan reefs, and separated from them by a channel 6 cables wide, with 17 to 24 fathoms in it, is 1½ miles in length E.N.E. and W.S.W., and has on its northern side a sand cay which dries 6 feet.

A small detached reef lies half a mile north-eastward of Erzherzog reef.

Friedrich reef is a small detached reef with a sand cay on its northern side which dries 7 feet at low water. It lies 4¼ miles South of Kumpong Kumpong island; and 1¾ miles westward of Erzherzog reef, with a clear passage between.

Chance rock, a small coral head with 1½ fathoms over it at low water and 13 fathoms around, lies midway between Friedrich reef and Egeria shoal; from it the sand cay on Friedrich reef bears N. 72° E., distant 2¾ miles, and the west summit of Saddle hill N. 61° W., distant 8 miles.

Egeria shoal is a small patch with a depth of 2 fathoms near its centre, situated with the western peak of Saddle hill bearing N. 41° W., distant 6¾ miles, and Siluugan islet bearing N. 59° E.

A small reef nearly awash at low water lies three-quarters of a mile N.N.W. ¼ W. from Egeria shoal.

Heel reef, the westernmost of the dangers in the vicinity, is a very small patch of rotten coral and mud, drying 2 feet at low water, steep-to all round and rising from a depth of 14 fathoms. From it the western on a W.N.W. bearing, and it remains clearly in view until it begins to close the higher land of mount Gemok behind.

Directions from Friedrich haven to Tawao. — **The inner route** passes south of Lehnert reef and north of Heel reef, and is perhaps the most convenient route to follow as the shore marks are comparatively near and well in view. From a position one mile northward of Friedrich reef, the sand cay on which will be distinguished, a course W. ¼ S. will lead three-quarters of a mile south of Lehnert reef, and the same distance north of Heel reef, and when Saddle hill bears N.W. by N. a course S.W. ¾ S. for 8 miles will pass one-third of a mile south-eastward of the elbow in the 5-fathoms line off English spit, and 1½ miles to the north-west of Hand rock; the latter is a danger specially to be guarded agniust.

The soundings give ample warning on approaching the south-east side of English spit, and maintaining a depth of 7 to 8 fathoms will ensure passing it at safe distance. On opening out mount Kukusan well clear to the southward of mount Putri bearing N.W. by W. ¾ W., a vessel should steer W. by N. ¼ N. up the channel; and on arriving off mount Putri, should take care not to bring mount Kukusan to the westward of N.W ¼ W. in order to avoid Swirl patch, which danger will be passed when Saddle hill is lost sight of beyond Batu Tinagat. The anchorage off Tawao is in a depth of 8 to 10 fathoms water, but it must be borne in mind that the edge of the bank is very steep off the point, and shoals suddenly from 8 fathoms to one fathom.

The outer route from Friedrich haven passes to the southward of Chance rock and Egeria shoal, and between Alert patches and Hand rock. Keeping mount Connor in line with the north extreme of Silungan islet, bearing N.E. ¾ E., a straight course leads three-quarters of a mile to the southward of Hand rock, and in clear weather no difficulty will be experienced in fixing the position of the ship by cross bearings.

SIBETIK ISLAND is about 20 miles in length in a W.N.W. and E.S.E. direction and about 7 miles in average width; it is separated from the mainland to the north-east by a strait 3½ to 5 miles wide, but to the north-westward there is only a narrow channel half a mile in width separating it from the Saodan delta on the mainland. A range of densely wooded hills traverses the island throughout its length, the highest point of this range, mount Antoinette, 1,550 feet in height, is in the middle. Cornelis peak, 550 feet high, near the eastern end of the island, is a somewhat conspicuous point when viewed from any direction to the southward of south-west, but is less remarkable from other views.

The north-east and east coasts only of this island were surveyed by H.M.S. *Egeria*. The whole of the north-east shore is fringed by man-

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See charts, Nos. 1,681 [2,611] and 2,099 [2,612].

grove swamps, but at the north point of the island there is a break in the continuity of the mangroves revealing a grassy patch of land, with reddish coloured cliffs.

The boundary line between British and Dutch territories on the parallel of lat. 4° 10′ N. passes nearly through the centre of Sibetik island.

Saima head, immediately opposite to Tawao on the other side of the strait, is the north-western limit of the detailed survey of this coast; it is a mangrove point fronted by mud flats which here skirt closely the edge of the mangroves, but widen outwards as the coast trends to the south-eastward towards East point.

At 4½ cables N.N.E. from Saima head there is a small sand bank that dries 4 feet at low water, with a depth of 8 fathoms between it and the shore.

Boundary beacons.—At 1$\frac{4}{10}$ miles S.E. from Saima head there is a stone beacon on the edge of the mangrove swamp to mark the exact spot where the parallel of 4° 10′ N. cuts the coast line; its position having been determined by joint observations on the part of British and Dutch officers. A similar beacon marks the spot where the boundary parallel meets the south-western shore of the island.

Boundary beacons have also been placed on the mainland at Bura point, and on the northern bank of the Simengaris river in long. 117° 23′ E., on the parallel of lat. 4° 10′ N. to mark the separation of British and Dutch territory.

East point, situated S.E. ½ S. 4½ miles from Saima head, is a rounded point with a hard sandy beach, backed by high casuarina trees. The sand and mud flats dry off to a distance of 1½ miles eastward of this point, but they are not so soft as the flats of unmixed mud further to the northward.

At 1½ miles northward of East point, and one mile from the coast, there is a sand bank that dries 4 feet, it is separated from the mud flats fronting the shore by a narrow channel.

The 3-fathoms and 5-fathoms lines pass close outside this sand bank, and the edge of the shallow water is very steep-to all along the shore from Saima head to abreast of East point, from which these contour-lines are distant 2 miles; the depth decreases suddenly from 6 to 2 fathoms.

Stone point.—From East point the coast trends to the southward with a slight indentation for 3¾ miles to Stone point: the sandy beach in this bight is backed by red cliffs from 20 to 80 feet high, the country behind is low and densely wooded. Off Stone point there are several patches of rocks that dry at low water, and at 1¼ miles to the south-westward of Stone point there is a very small islet close to the coast which from thence trends south-westerly and westerly for 3¼ miles to the south point of the island.

See chart, No. 2,099 [2,613].

Dutch spit.—Eastward of Stone point the 3-fathoms contour line projects in a sharp elbow to a distance of 5¾ miles from the coast; from the extremity of this spit, which is known as Dutch spit, the southern extreme of Sibetik island bears W. by S. ¼ S. and mount Batu Chinaga N. by W. ½ W. A detached shoal with 2¾ fathoms on it lies 1½ miles N.N.W. from the end of the spit. The 5-fathoms line extends 1¾ miles eastward of Dutch spit.

Vessels approaching Tawao from the southward should be careful in rounding Dutch spit, more especially on the flood tide.

Padang bank, lying 2 miles S.S.E. from Stone point, has on it a patch that breaks, with only 8 feet water over it, from which the south point of Sibetik island bears W. ½ S.

Mangkassar banks, portions of which dry at low water, are two banks lying east and west of each other, and are together nearly 3 miles in length within the depth of one fathom; they are narrow, and steep-to on both the north and south sides. The western edge has not been defined: from the eastern end of the bank in a depth of 3 fathoms, mount Batu Chinaga bears N. ½ W., and the south point of Sibetik island W. by N. ½ N., distant about 8 miles. A ridge extends eastward from the shoal extremity of these banks, to a distance of 3½ miles within the limit of the 5-fathoms contour-line.

The channel between Mangkassar and Padang banks has a depth of 5 to 7 fathoms in it, but in view of the survey having terminated short of its western end it would be imprudent to attempt to pass through it.

Unarang rock is a small rocky patch that dries one foot at low water, springs, with 9 to 20 fathoms close around. It is situated just outside the edge of the 20-fathoms contour-line, with mount Batu Chinaga bearing N. 24° W., distant 15½ miles, and the south point of Sibetik island W. ½ N., and forms the southernmost outer danger in the approach to Tawao. The main entrance to the strait north of Sibetik island lies between Unarang rock and Hand rock, 9½ miles to the north-east.

A patch of 3 fathoms with no soundings around it is charted in lat. 3° 51′ N., long. 118° 11′ E.

Banda reef is a coral reef with a depth of 6 feet over it, situated in lat. 3° 49′ N., long. 118° 0′ E.

SIBUKO RIVER appears to be large and important; the entrance is divided into two arms by the island East Nonukong; on the bar at the mouth of the southern entrance a least depth of 4½ fathoms is shown on the chart. A shoal spit with 3 fathoms at the end is shown as extending 7 miles to the eastward of Nonokong island.

The coast of Borneo southward of latitude 4″ N. is described in Eastern Archipelago, Part II.

See charts, Nos. 2,099 [2,612] and 2,576 [2,603].

Annex 5

LETTER FROM JOHN HAY, DEPARTMENT OF STATE TO THE SECRETARY OF THE NAVY DATED 3 APRIL 1903, WITH ENDORSEMENTS

Copy. W.

(COPY--McC). A/H

DEPARTMENT OF STATE,
Washington,

April 3, 1903.

The Honorable
the Secretary of the Navy.

Sir:-

Your letter of the 14th ultimo (G.B.No.326) has had the attentive consideration of this Department. You state therein that it has been called to your attention that certain maps of the Philippine Islands, published by the War Department, do not include within the limits of the possession of the United States several outlying islands of the Sulu Archipelago over which Spain formerly exercised or claimed sovereignty, the islands in question being several small groups lying in the straits of Balabac or the Sulu Sea more than three marine leagues from the coast of Borneo. On comparison of the provisions of the Treaties of 1898 and 1900 between the United States and Spain, as well as of the Protocol of 1885 between Germany, Great Britain and Spain, touching the sovereignty of the Sulu Islands, it is your understanding that the sovereignty of the United States covers all outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo, except the islands of Balambangan, Banguey and Malawali. You request this Department to examine the question and inform you whether your interpretation of the treaties is correct, or whether there exists some treaty entered into by Spain subsequent to the Protocol of 1885 and previous to the Treaty of Peace with the United States by reason of which the territories of Spain at the time of the latter were not co-extensive with the description of them in the former. If this Department coincides with you interpretation, you state your intention of having a chart issued which will clearly show the boundary line, and of requesting the War Department to have its maps corrected.

Spain, by the Treaty of Peace of December 10, 1898, ceded to the United States by metes and bounds, "the Archipelago known as the Philippine Islands;" and by the subsequent treaty signed November 7, 1900, specifically relinquished to the United States all title and claim of title which she might have had at the time of the conclusion of the Treaty of Peace to any and all islands belonging to the Philippine Archipelago and lying outside the lines described in Article 3 of the Treay of Peace, and particularly to the islands of Cagayan Sulu (Cagayan de Jolo) and Sibutu

Of the islands named, Sibutu is the most southwesterly of the Sulu group proper, lying almost south of the eastern extremity of British North Borneo; while Cagayan de Sulu (identified as its name shows with the Sulu group) lies to the northwest of the main Archipelago, some distance north of the North Borneo mainland and to the eastward of the most northerly cape thereof.

Spain having thus relinquished to the United States all title and claim of title appertaining to her at the date of the Treaty of Peace, in and to the Sulu Archipelago, expressly naming two of the well-known Suluan Islands, it is proper in the first place to examine what little existed and was claimed by Spain to the Sulu Archipelago at that time, and, incidentally, to take note of any conventional recognition of Spanish title thereto on the part of other powers.

Spain's claim of seigniory and protection over the whole of the Sultanate of Sulu dates back several centuries, being coincident with the establishment of Spanish rule in the Philippines -- "for several centuries until this day it / the "Crown of Spain/ has continued to be their sole Lord and Protector." (Act of Submission of Sulu to Spain, April 19, 1851). Several capitulations between the Sultan of Sulu and Spain existed, particularly those concluded in 1737 which constituted Spain the ally and protector of the Sultan.

The extent of this seigniory and Protectorate is defined in the Capitulations of Protection and Commerce between Spain and the Sultan of Sulu (in Spanish, Jolo), signed September 23, 1836, by the 1st Article of which Spain guaranteed to the Sultan protection and armed aid "throughout the whole extent of the islands which lie within the limits of Spanish right and which "stretch from the western extremity of Mindanao to Borney (Borneo) "and La Paragua,[X] with exception of Sandacan (Sandacam) and the "other territories tributary to the Sultan on the mainland of "Borney (Borneo)." Article II of those capitulations describes the status of Sulu as one of "friendship and protection which "binds Sulu in sisterhood to the Spanish provinces of the Phil-

[X] Now known as Palawan.

"ippines" and in furtherance of that sisterhood mutual favors of commerce and navigation were stipulated, - while the Sultan engaged to repress acts of piracy of his subjects against the Philippines.

On the same day that the foregoing capitulations were signed, September 23, 1836, Articles of Agreement were also drawn up, fixing the duties to be paid by vessels of Sulu in Manila and Zamboanga, and by Spanish vessels in Sulu. This agreement, which was ratified by the Governor Captain General of the Philippines, January 20, 1837, is not material to the subject matter of the present letter. A translation of its text can be consulted by reference to the printed "hearings before the Committee on the Philippines of the United States Senate", Senate Document 331, 57th Cong., 1st Sess. - Part 3, Page 2131 et seq.

Additional capitulations were signed between Spain and the "Sultan and Dattos of Jolo" August 27, 1850, whereby the Sultan, for himself and his Dattos, engaged, - by Article I, not to grant to any foreign power "any portion of the territory forming part "of the group of islands which lie within the boundaries of Span- "ish right;" and, by Article II, not to cede any part of his tributary territories without the previous consent of Her Catholic Majesty (Isabel II).

In the following year, the territory of Sulu with its dependencies was annexed to the crown of Spain and joined to the Philippines Archipelago by formal capitulations entitled "Act "of New Submission of the Sultan and Dattos of Sulu to the Sov-

"ereignty of Her Majesty, signed at Jolo April 19, 1851". This annexation, which was declared to have been affected by conquest, was absolute and complete, The first article of this treaty may be quoted in full:

"Article I. The very excellent Sultan of Sulu (Jolo) Mahamad "Pulalon, for himself, his heirs and descendants; the Dattos Ma-"hamad Bullo-Mulok, Daniel-Amil-Bajal, Banda-Jala, Mulok-Cajal, "Amil Barral, Tamangon, Yo-Han, Sana-Ya-Han, Maip, Mamancha and "the Serib Mahamad Binsarin, of their spontaneous and free will "declare: that, to the end of making reparation for the outrage "done to the Spanish nation on the first day of January of the "present year, they desire and entreat that the island of Sulu "(Jolo) with all its dependencies be incorporated with the Crown "of Spain which in the last several centuries has been and now "is its sole Lord and Protector; making anew on this day a sol-"emn act of adhesion and submission, recognizing Her Catholic "Majesty Dona Isabel II, Constitutional Queen of all the Spains, "and those who may succeed her in that supreme dignity, as their "Sovereigns, Lords and protectors as they are of right not only "under the treaties concluded in remote epochs and that of one "thousand eight hundred and thirty-six and the additional pro-"visions made by the present Governor of Zamboanga in August last, "but also particularly in virtue of the recent conquest of Sulu "(Jolo) effected on the twenty-eighth of February of the present "year by the Most Excellent Senor D. Antonio de Urbistondo, Mar-"quis de la Solana, Governor Captain General of the Philippine "Islands".

The remaining articles of this Act of Submission are no less explicit as to the sovereignty of Spain.

By Article II the Sultan and Dattos pledge themselves to maintain in its entirety the territory of Sulu and its dependencies "as part of the archipelago belonging to the Spanish Govern-"ment".

Article III reads thus:

"The Island of Sulu (Jolo) with all its dependencies "being incorporated with the crown of Spain and its inhabitants "forming part of the great Spanish family which peoples the vast "Philippine Archipelago, the Sultan and Dattos are not competent "to enter into or sign treaties, commercial conventions or alli-"ance of any kind with European Powers, companies or persons, "corporations and Malay Sultans and Chiefs, under penalty of "nullity; they declare null and void each and every treaty en-"tered into with another power is the same be prejudicial to the "ancient and indisputable rights which Spain possesses over the "whole of the Sulu archipelago as a part of the Philippines Ar-"chipelago; and they ratify, renew and continue in all their force "and validity any instruments heretofore drawn up which contain "any provision in favor of the Spanish Government from the most "remote times".

Article V stipulates that the war-flag of Spain shall alone be used in the dominions of the Sulu.

"Article VI. The Island of Sulu (Jolo) and its dependencies "being declared an integral part of the Philippine Archipelago "which belongs to Spain, freedom of trade, under the Spanish flag, "is conceded in all the ports dependant upon the Sultanate, with-

"out restriction of any kind, as is done in the Ports of the Nation".

Article VII prohibits the unauthorised construction of fortifications and the traffic in fire arms, because of the Sultan and Dattos of Sulu "having recognized the sovereignty of Spain "over their territory, which sovereignty is now strengthened and "confirmed (robustecida), not alone by the right of conquest but "also by the clemency of the conquerer".

Article VIII provides for issuing Royal Spanish Commissions to the Sultan and Dattos.

By Article IX the Spanish Government guarantees to the Sultan and the inhabitants of Sulu the free practice of their religion and customs.

By Article X the Spanish Government guarantees the succession of the Sultan and the dignitaries of Sulu.

Article XI gives to the vessels and goods of Sulu in Spanish ports the same rights as enjoyed by the ships and goods of the Philippines.

The situation created by the Act of Submission of 1851 was interrupted by an insurrectionary movement in 1878. On its suppression, capitulations of peace and submission to the sovereignty of Spain were concluded by the Sultan and Dattos on July 22, 1878, Article I of that instrument reads:

"We /the Sultan and Dattos/ declare the sovereignty of Spain "in all the Archipelago of Sulu (Jolo) and its dependencies not "to be open to question (indiscutibles), and as the natural con-

"sequence of this fact we constitute ourselves loyal subjects of "His Majesty the King Don Alphonso XIII, and his successors in "power".

No further capitulations between Spain and Sulu are found.

From the foregoing, the absolute sovereignty of Spain over the whole of the Sulu Archipelago and its dependencies appears to have been established, by conquest and capitulation, since 1851, putting Spain in a position to make valid relinquishment of title and claim of title thereto in favor of the United States.

The territorial limitations of this title and claim of title are ascertainable from the Protocol entered into by Spain with Great Britain and Germany in 1885.

In 1877 a protocol with those countries was concluded in settlement of difficulties which had grown out of Spanish interference with British and German vessels trading with the Sulu Archipelago. It does not contain any definition of the Spanish territorial claim which was general as to the whole of Sulu and its dependencies.

Declaration I of this Protocol, signed in the French language at Madrid, March 11, 1877, reads:

"Commerce and direct trade of the vessels and subjects of "Great Britain, Germany and other Powers with the Archipelago of "Sulu (Jolo), and in all parts thereof, as well as the right of "fishery, without prejudice to the rights of Spain acknowledged "by the present Protocol, are declared to be and shall be absolutely free".

The rights so acknowledged were those pertaining to sovereignty and exercisable by Spain in "the points occupied by Spain in "the Archipelago of Sulu", with which places free trade and fishing were restricted, while provision was made for their subsequent exercise "in case Spain should effectively occupy other "points in the Archipelago of Sulu" of which occupation notice was to be given. (Declaration III).

The effect of the Protocol of 1877, therefore, was, while asserting and obtaining acknowledgement of sovereign rights on the part of Spain in all the Archipelago of Sulu and its dependencies, to stipulate that Spain would not exercise those rights against the vessels of Great Britain, Germany and other Powers trafficking with places not then or thereafter under the effective administration of Spain. It recognized the right of Spain to establish such administration, at will, anywhere in the Archipelago and its dependencies, and to enforce tariff duties and regulations therein.

The later Protocol (also in the French language) signed at Madrid, March 7, 1885, by the representatives of Spain, Germany and Great Britain, is more explicit on the point of sovereignty , besides containing a precise defination of the territorial claim of Spain in the Sulu Archipelago. Articles I, II, and III, which deal with the matter of sovereignty, read thus:

Article I.

"The Governments of Great Britain and Germany recognize "the sovereignty of Spain over the places effectively occu-"pied, as well as over those places not yet so occupied, of "the Archipelago of Sulu (Jolo), whereof the boundaries are "determined in Article II.

Article II.

"The Archipelago of Sulu (Jolo), conformably to the definition contained in Article I of the Treaty signed the 23d "of September 1836, between the Spanish Government and the Sultan of Sulu (Jolo), comprises all the islands which are found "between the western extremity of the Island of Mindanao on "the one side, and the continent of Borneo and the Island of "Paragua (Palawan) on the other side, with exception of those "which are indicated in Article III.

"It is understood (entendu) that the Islands of Balabac "and of Cagayan-Jolo form part of the Archipelago".

Article III.

"The Spanish Government relinquishes as far as regards "the British Government, all claims of sovereignty over the "territories of the continent of Borneo which belong, or "which have belonged in the past to the Sultan of Sulu (Jolo), "including therein the neighboring Islands of Balambangan, "Banguey and Malawali, as well as all those islands lying "within a Zone of three marine leagues along the coasts, "and which form part of the territories administered by the "Company styled British North Borneo Company".

Article IV textually recites and confirms the fishing and trading concessions contained in Declarations I, II, and III of the prior Protocol of March 11, 1877.

This Protocol continued to define the relations of Spain, Great Britain and Germany with respect to the intercourse of foreign vessels with the Sulu group until the date of the signature of the Treaty of Peace between the United States and Spain on December 10, 1898. An amendment, or explanatory construction was agreed upon by the three powers on March 30, 1897, and is printed in the Gaceta de Madrid of March 31st as a formal protocol. Its purport is to admit the right of Spain to prohibit, upon giving notice, all traffic, without distinction of flag, in firearms, munitions and alcoholic liquors throughout the Archipelago of Sulu, including those parts not under the effective administration of Spain. The concluding paragraph of this additional protocol of 1897 reads:

> " With this construction, the aforesaid protocol of "March 7, 1885, remains in force in all its parts, without "change of any kind".

Careful search has failed to show any later protocol on the subject between Spain, Germany and Great Britain, or any act bearing upon the title of Spain to the Sulu Archipelago.

As the result of the examination herein summarized, I have the pleasure to concur in your interpretation of the treaties mentioned in your letter. My views may be thus summed up:

1. The capitulations of 1836 assert and confirm the full seigniory and protectorate of Spain over the Sulu Archipelago and all its tributaries and dependencies, with guarantee of armed aid to the Sultan in all of the"islands which lie within the limit "of Spanish right, and which stretch from the western extremity "of Mindanao to Borney (Borneo) and La Paragua (Palawan)" while withholding that guarantee from the tributary territories of the

Sultan on the mainland of Borneo;

2. This seigniory and protectorate of Spain over Sulu became converted in 1851 by conquest and annexation, into full sovereignty.

3. This sovereignty was reaffirmed by the Act of Submission of the Sultan and Dattos of Sulu in July, 1878, after which time no change occurred in the relation of Sulu to Spain.

4. The Protocol of 1877, between Spain, Great Britain and Germany recognized the sovereignty of Spain over all the Sulu Archipelago, merely stipulating for certain favors to foreign shipping in the places effectively occupied by Spain, and for the exemption of all foreign shipping from Spanish administrative control in all places not effectively so occupied.

5. The Protocol of 1885 between the same Powers (a) expressly recognized the sovereignty of Spain over all parts of the Sulu Archipelago then or thereafter to be effectively occupied by Spain; (b), defined the limits of the Archipelago as extending from Mindanao to Borneo and Palawan and including Balabac and Cagayan-Jolo; but (c), relinquished, so far as Great Britain was concerned, all claim of sovereignty derived from the past sovereignty of the Sultan of Sulu over territory on the mainland of Borneo, and, in addition, over the islands of Balambangan, Banguey and Malawali, together with a water strip three marine leagues in width along the coasts of the Bornean mainland--- then under control of the British North Borneo Company.

6. The later Protocol of 1897 between the same Powers confirms the Protocol of 1885, with an amendment recognizing the sovereign capacity of Spain to enforce at will a general

prohibition of traffic in arms, munitions and alcoholic liquors throughout all parts of the Sulu Archipelago, whether effectively occupied by Spain or not.

7. The Spanish Government was, therefore, at the time of the signature of the Treaty of Peace, December 10, 1898, fully seized of sovereignty over the whole of the Sulu Archipelago up to three marine leagues of the mainland coasts of British North Borneo, with exception of the three named islands of Balambangan, Banguey and Malawali, as to which latter Spain had relinquished, so far as Great Britain was concerned, all claim of sovereignty; and was competent to cede, and did in fact cede and relinquish to the United States, by the Treaties of 1898 and 1900 all title and claim of title she then possesse in and to the Sulu Archipelago.

For your convenient reference I append carefully revised translations of the several capitulations, acts and protocols herein cited.

I have the honor to be, Sir,
Your obedient servant,
(Signed) JOHN HAY.

COPY--R.

1st endorsement, Bureau of Equipment, July 28, 1903. G.M.
Subject: Navy Department: Forwards letter from State Department relative to sovereignty of the United States over islands of the Sulu Archipelago, and directs the publication by the Hydrographic Office of a chart or charts upon which shall be marked the boundary line between the possessions of the United States and of British North Borneo.

---

1. Respectfully returned to the Department.

2. The Bureau forwards herewith seven charts (H.O.Nos. 1709, 2116, 2117, 2118, 2119, 2121, and 2122) upon which are drawn lines showihg the boundary between the possessions of the United States and those of British North Borneo as set forth,according to its interpretation, in the accompanying letter from the State Department. If these lines are pronounced correct, the Bureau will have the charts published with the boundaries in accordance with instructions of the Department.

3. The coasts of British North Borneo have been construed as included between Kimanis Bay on the West Coast, around by the North coast to Tapean Durian, in the Straits of Macassar.

(Signed) R. B. BRADFORD,
Chief of Bureau.

2d endorsement,Navy Department, July 30, 1903.
Respectfully referred to the General Board for report and recommendation.

(Signed) DARLING,
Acting Secretary.

3d endorsement, Bureau of Navigation, August 1, 1903.
Forwarded to the General Board.

(Signed) H. C. TAYLOR,
Chief of Bureau.

4th endorsement, General Board, November 25, 1903.
Respectfully returned to the Department, through the Bureau of Navigation, by direction of the General Board/ The report and recommendation required by the 2d endorsement are submitted in a separate letter of this date by the General Board.

(Signed) FRANK MARBLE, Lieut., U.S.N.,
Secretary of Board.

5th endorsement, Bureau of Navigation.
Received Nov. 25, 1903. Forwarded Nov. 25, 1903 to the Department.

6th endorsement, November 25, 1903.
Respectfully returned to the Bureau of Equipment inviting attention to the correspondence between the Secretary of State and the Acting Secretary of War, which was referred to the Bureau of Equipment on October 24, 1903.

2. The Department accordingly directs that, for the present, the boundary line be omitted from the charts; and that a note be printed, either in the general legend of the chart or in brackets, *in situ*, reading:

"By a treaty signed November 7, 1900, Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside of the lines described in the Treaty of Peace of December 10, 1898; and in particular to Sagayan-Sulu and Sibutu and their dependencies."

(Signed) CHAS. H. DARLING,
Acting Secretary.

Annex 6

LETTER FROM MAJOR E.R. HILLS, ACTING ASSISTANT ADJUTANT GENERAL, WAR DEPARTMENT TO THE COMMANDING GENERAL, DIVISION OF THE PHILIPPINES DATED 12 MAY 1903

War Department,
Adjutant General s' Office,
Washington,

488364

May 12, 1903.

The Commanding General,
Division of the Philippines,
Manila, P. I.

I have the honor, by direction of the Secretary of War, to hand you herewith copy of a letter from the Secretary of State to the Secretary of the Navy, dated April 3d last, relating to the true boundary line of the Philippine Archipelago, in which it is stated that the existing maps of the War Department omit several islands forming part of the Sulu group which formerly belonged to Spain and which are now clearly included in the possessions of the United States, as also copy of letter of the Secretary of the Navy to the Secretary of War, dated April 16th, 1903, on the subject.

The Secretary desires me to say that the authoritative decision of the State Department is conclusive and final as to all legal questions arising therein, and there remains only the duty of correcting the existing maps to conform to that decision. A new map of the Philippine Islands, in which the exact boundary lines according to the treaties between the United States and Spain are indicated, is now in course of preparation and will be forwarded you as soon as ready.

A copy of this correspondence has been furnished the Civil Governor of the Philippine Islands.

Very respectfully,

E. W. Hills.

Major, Artillery Corps,
Acting Assistant Adjutant General

2 Enclosures.

For the Insular Bureau,
War Department,

Annex 7

TELEGRAPHIC NOTE FROM GOVERNOR BIRCH TO THE BRITISH NORTH BORNEO COMPANY DATED 22 JUNE 1903

No. 44.

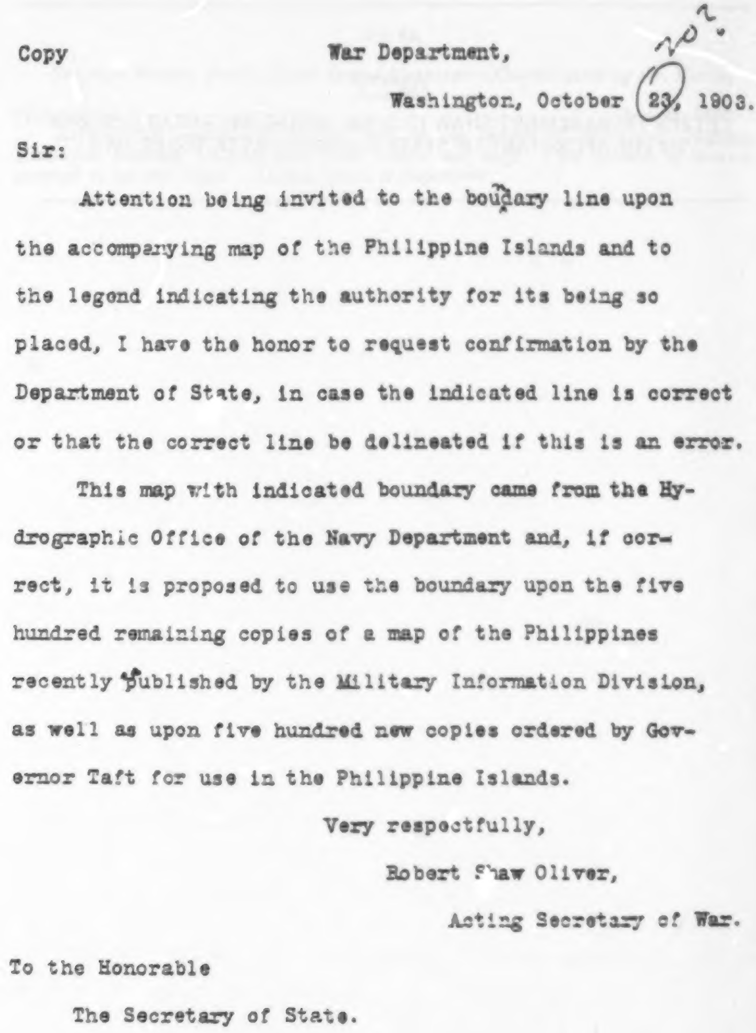
Governor Birch to British North Borneo Company.—(Communicated by Mr. Martin, June 22.)

(Telegraphic.) *June* 22, 1903.

AMERICAN man-of-war paid a visit to the Islands of Bakungan, Taganac, Lankayan, Sibaung, Lihiman, and fixed tablets and flags. I am advised by letter to proceed to the east coast. Prompt action is imperative.

Annex 8

LETTER FROM ROBERT SHAW OLIVER, ACTING SECRETARY OF WAR TO THE SECRETARY OF STATE DATED 23 [20] OCTOBER 1903



202.

Copy

War Department,

Washington, October 23, 1903.

Sir:

Attention being invited to the boundary line upon the accompanying map of the Philippine Islands and to the legend indicating the authority for its being so placed, I have the honor to request confirmation by the Department of State, in case the indicated line is correct or that the correct line be delineated if this is an error.

This map with indicated boundary came from the Hydrographic Office of the Navy Department and, if correct, it is proposed to use the boundary upon the five hundred remaining copies of a map of the Philippines recently published by the Military Information Division, as well as upon five hundred new copies ordered by Governor Taft for use in the Philippine Islands.

Very respectfully,

Robert Shaw Oliver,

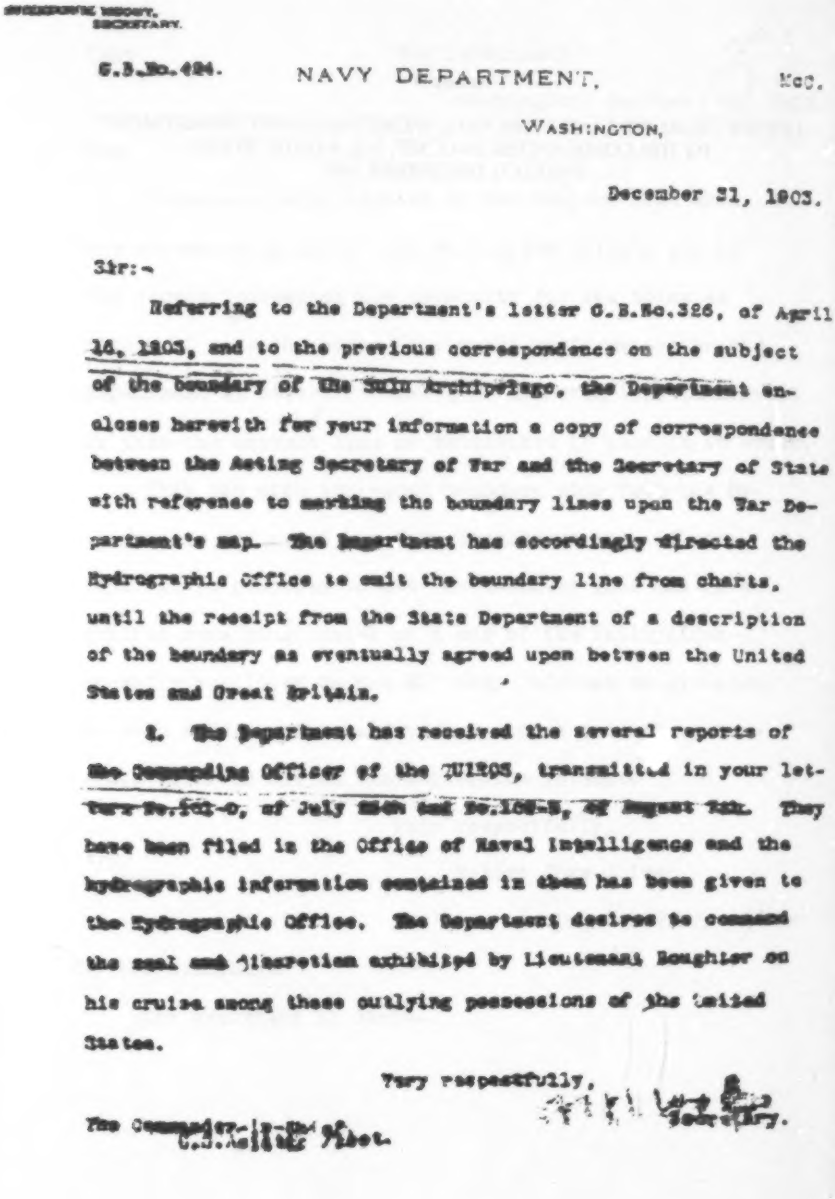
Acting Secretary of War.

To the Honorable

The Secretary of State.

Annex 9

LETTER FROM WILLIAM M. MOODY, SECRETARY, NAVY DEPARTMENT TO THE COMMANDER-IN-CHIEF, U.S. ASIATIC FLEET DATED 31 DECEMBER 1903



[illegible]
SECRETARY.

G.B.No.424. NAVY DEPARTMENT, McC.

WASHINGTON,

December 31, 1903.

Sir:-

Referring to the Department's letter G.B.No.326, of April 16, 1903, and to the previous correspondence on the subject of the boundary of the Sulu Archipelago, the Department encloses herewith for your information a copy of correspondence between the Acting Secretary of War and the Secretary of State with reference to marking the boundary lines upon the War Department's map. The Department has accordingly directed the Hydrographic Office to omit the boundary line from charts, until the receipt from the State Department of a description of the boundary as eventually agreed upon between the United States and Great Britain.

2. The Department has received the several reports of the Commanding Officer of the QUIROS, transmitted in your letters No.101-O, of July [illegible] and No.108-S, of August [illegible]. They have been filed in the Office of Naval Intelligence and the hydrographic information contained in them has been given to the Hydrographic Office. The Department desires to commend the zeal and discretion exhibited by Lieutenant Boughter on his cruise among these outlying possessions of the United States.

Very respectfully,

[illegible]
Secretary.

The Commander-in-Chief,
U.S.Asiatic Fleet.

Annex 10

REPORT FROM H.W.H. BUNBURY AND G.ST.V. KEDDELL, COMMISSIONERS, TO THE GOVERNMENT SECRETARY, SANDAKAN DATED 24 FEBRUARY 1913

Copy

Tawao, 24th February 1913.

Sir,

We have the honour to forward the following report on the Expedition despatched to determine the Boundary between the State of British North Borneo and the Territory of the Netherlands Indies, together with the following appendices:-

A. Copy of the Boundary Treaty of 1891.

B. Joint-report by the British and Netherland Commissioners on the determination of the Boundary Line.

C. Detain report by the British Surveyor on the boundary Survey.

PRELIMINARY INSTRUCTIONS

2. On the 2nd May last we were summoned to an interview with His Excellency, F. R. Ellis, in the Governor's Office at Jesselton and H. E. informed us concerning the preparations made by the Government of the Netherlands Indies of an Expedition to determine on the spot the Boundary between our respective Territories, which Expedition we were to accompany as representatives of the British North Borneo Government. Mr. Keddell who had tendered his resignation from the Government service was especially engaged for the survey work of the Commission and the terms of his engagement were there and th then settled. Tents were to be ordered for our use while on the Expedition.

3. Instructions were issued to Mr. Bunbury in accordance with H. E's minute of 2nd May in S. P. G.O.1310/12 by the Honourable the Government Secretary's minute dated 16th May in the same paper and to Mr. Keddell in the Honourable the Government Secretary's letter dated 3rd May. A further letter from the Honourable the Government Secretary dated 30th May formally acquainted Mr. Bunbury concerning his appointment as Representative of the British North Borneo Government on the Commission.

The Honourable,
The Government Secretary,
Sandakan.

COMMISSION

4. On the 30th May a Commission was issued to us by His Excellency the Governor investing us with powers in respect of the Delimitation of the Boundary in the following terms:-

" WHEREAS it has been deemed expedient by the Governments of "British North Borneo and the Netherlands Indies that the Boundary "between the State of British North Borneo and the Territory of the "Netherlands Indies should be demarcated and determined,

" AND WHEREAS certain arrangements have been made in that "behalf between His Excellency the Governor General of the Netherlands "Indies and the Right Honourable Sir J. West Ridgeway, G.C.M.G and so on "(Chairman of the British North Borneo Chartered Company on behalf of the "Government of British North Borneo) whereby an Expedition is to be "formed of Representatives of the two Governments to determine the said "Boundary,

" NOW THEREFORE I appoint E. W. L. Bunbury to be the Civil "Commissioner and G. St V. Keddell to be the Surveyor attached to the "Expedition as Representatives of the Government of British North Borneo "with powers to arbitrate and determine and delimitate the said "Boundary, to fix such permanent marks as may be considered necessary and " generally to take such steps as may be necessary to fix and determine the " said Boundary. Your arbitrations and decisions in all cases to be "subject to my covering approval."
"

SCOPE OF DUTIES

In accordance with our verbal instructions and the wording of the Commission we considered that we had power to determine finally the Boundary in co-operation with the Dutch representatives subject to the proviso that our determinations should subsequently meet with the approval of His Excellency the Governor.

6. The instructions issued to the Dutch Commissioners were as follows:-

"(a) The Commission is charged in co-operation with an Expedition "sent out for this purpose by the British Government to delimitate on "the spot the Frontier between Netherland Territory and British North "Borneo as agreed by Treaty, so far as, and in such manner as it may be "considered necessary, and to prepare a map of the District concerned.

"(b) In the Delimitation of the Frontier regard must be had to the "Landmarks erected by the Netherland - British Commission in the year "1891 and since replaced by granite pillars at the points where the "parallel of 4°10' N. L. cuts the East coast of Borneo and the West "and East Coasts of Sebatik Island, and to the interpretation of Article "II of the Frontier Agreement of the 20th June 1891, published by both "Governments in 1905, so far as it concerns that part of the Frontier "between the aforesaid point on the East Coast of Borneo, and the "intersection of the Meridian of 117° E. Lat. with the parallel of 4°20' N Lat."

"(d) The Commission shall as far as possible give any assistance
"desired to the expedition sent out by the British Government.
"(e) The Commission shall permit the British Expedition to occupy
"Dutch Territory to whatever extent may be necessary for the purposes
"of the Expedition.
"(f) The Commission is not authorised to take any step in connection
"with the regulation of the frontier which might be binding on either
"or both Powers, in anticipation of the decision of either Power.
"(g) After the conclusion of their task the Commission shall place at
"the place disposal of the Netherland India Government the whole
"of the information obtained without exception: shall prepare an
"exhaustive report of their labours, and shall present a proces/ verbal,
"showing details of the delimitation as settled, accompanied by two
"copies of a map of the District."

7. The question as to whether we had misunderstood the instructions issued to us was raised in the Assistant Government Secretary's letter addressed to us on the 18th October last.

PREPARATIONS AND JOURNEY TO JOIN THE EXPEDITION

8. Previous to our departure for Dutch territory at the end of the month of May we were fully occupied with the duties of our respective offices, Mr. Bunbury being appointed temporarily to the Residency of the Interior and Mr. Keddell having survey work to finish before vacating the post then held by him in the Government service. We had little time for making the necessary arrangements and were rather handicapped by ignorance of the conditions under which we were to work, of the time the Expedition was likely to be prolonged and of what opportunities we should have for obtaining supplies and for communication with North Borneo.

9. At the request of the Honourable the Commandant Mr. Bunbury selected the men who were to act as escort and prepared a list of supplies to be purchased and given to the men for two months' victualling. We had also to arrange for our own supplies for the same period.

10. On the 31st May we left Jesselton and reached Sandakan on the 2nd June, whence we were to be conveyed by steam yacht sent from Banjermasin to bring us to join the Dutch Expedition. We left Sandakan on the 6th June in the N. I. s.y. "Hazenwind" and arrived at Tarakan the following day. Here we were met by Captain van Genderen Stort, the Chief Dutch Commissioner, in the "Sophia" the launch placed at the disposal of the Expedition.

11. We arrived at Flajo on the Sembakung river on the 6th June and here met the other two Dutch Commissioners. A Dutch Sergeant together with convicts and part of the escort had already left for the upper Sembakung to prepare camping places at suitable spots all the way up the river as far as the Tagul, the mouth of which river was stated by Captain Stort to be some ten miles below the frontier line.

CONSTITUTION AND EQUIPMENT OF THE EXPEDITION

12. The Dutch Commission consisted of three members.

Capt. F. van Gendaren Stort, of the General Staff.
Heer J. H. G. Schepers, Engineer of the Topographical Dept.
Lieut. E. A. Vreede, Royal Navy.

13. Attached to the Expedition were the following:-

Lieut. D. Branderhorst, Army Medical Corps.
Lieut. W. A. van der Cant, Infantry.
Sergt. G. Geldof, Infantry
2 European Corporals of the Army Medical Corps.
2 Eurasian Sergeants of the Survey Department.
1 European Private of the Engineers.
2 Native N. C. O.'s.
16 Native Privates.

14. Heer Munniks de Jongh of the Mining Department accompanied the Expedition to make a rough, geological survey of the Dutch territory, and the Zoological and Botanical Departments at Buitenzorg also were represented by native Assistants sent to obtain specimens for them.

15. 100 Convicts were brought as carriers and general labourers, w while the working of the 25 natives- made craft for the negotiation of the rivers was entrusted to 100 natives recruited in the Interior of the Bulongan District.

16. The British detachment consisted of ourselves with our escort of 6 Native N. C. O 's and men, four servants and a mandor, bringing the total of the combined expedition to 257 persons.

17. For the accommodation of ourselves and our servants we were provided with two tents 10 ft by 12 ft. For our police no provision was made. The Dutch brought rolls of American cloth. All their stores and general effects were packed in kerosine oil tins with covers, and their rice in tins hermetically sealed.

SURVEY AND INSTRUMENTS

18. For the delimitation of the Boundary it was necessary to carry out a rough topographical survey of the belt of country ten geographical miles wide having for its centre lines.

first The straight line running from the point of intersection of the East Coast by the parallel 4°10' N. which point had already been determined and marked by a pillar, to the point in Latitude 4°20' N and Longitude 117°E.

second The parallel of 4°20' N from Longitude 117°E westward to its intersection with the main watershed that divides the rivers that flow to the North West Coast from those that flow to the South East Coast (vide Article III of the Treaty).

19. Before the topographical survey could be commenced it was necessary to determine on the ground by astronomical observations the positions of points of, or in terms of, these two centre lines. These points had then to be connected up by traverses: and from these traverses the necessary topographical features were fixed.

20. For the astronomical work an 8 inch "Universal" instrument was used together with nine box chronometers. The traverses were carried out by the two Eurasian surveyors, the instruments used being Circumferentors fitted with telescopes for Tachecmetric measurement. When filling - in work from the traverses use was made of intersecting bearings from points along the traverses: but when the points required were not visible from more than one point in the traverse the distances were measured with a prismatic rangefinder.

21. For the rougher determination of Latitude a prism circle was used and gave good results as compared with the results obtained by means of the "Universal".

ITINERARY AND PROCEEDINGS OF THE EXPEDITION

22. At our first meeting with the Chief Dutch Commissioner, i.e. while we were going from Tarakan to the Sembakung, he told us what he had arranged and pointed out that until we knew at what point the Sembakong crossed parallel 4°20' N Lat. it was impossible to decide what survey should be undertaken: under the circumstances therefore he suggested that a conference would be quite unnecessary, in fact that there was nothing to discuss until more was known of the field of operations. We were ready to agree with any reasonable suggestion put forward by him and the result was that we deferred any discussion till we should reach the mouth of the Tagol, at which point a depot was to be prepared by the advance guard already despatched up the river.

23. At Plajo we remained until the 12th June when the Expedition set out on the journey up the Sembakong, a journey that was beset with the greatest difficulties of all the journeys undertaken in the course of the whole expedition. The river was in flood and progress in consequence slow, and the rapids very dangerous for heavily laden boats. With delays caused by having to wait for boats that dropped behind it was the 21st before we reached the Samelumbong River, where had been prepared the seventh camp, though so far no great difficulties had been encountered. From here onwards, nearly the whole way up to the mouth of the Tagol river, rapids are constantly met with, such as would be impassable except for skilled boatmen accustomed to negotiating such difficulties. At many of these places the boats have to be unloaded and then pushed and hauled bodily over the boulders. After this we got separated from the rest of the Expedition and had to continue on our way as best we could with our six police and six boat coolies, no one of whom had even been on the river before. It was not until the 2nd July that we again saw any of the Dutch. The cause of our

our separation was that Mr. Keddell's boat was swamped when being hauled through a rapid and that we had in consequence to stop for repairs: a considerable quantity of our stores was lost and much of Mr. Keddell's property spoilt: the river rose some sixteen to eighteen feet, forced us in the middle of the night from one precarious position to another and detained us for four days. Our difficulty was increased by one of our police being so ill that he had to be lifted in and out of the boat. The Dutch however left us and continued their journey to the Tagol. We finally reached Labang, at the mouth of the Selalir river on the 29th where again we were delayed by floods until the 3rd July when we were able to push on towards the Tagol. On the way we met a part of the Expedition returning as observation at Tagol had showed the place to be well within our territory: we accordingly returned to Labang.

24. The journey to the mouth of the Tagol from Labang was, we were later informed, no easy matter owing to the floods and whereas only one half-way camp had been prepared by the advance detachment it took most of the Expedition three and a half days to cover the distance: their Leader, Capt. Scott, got ahead and left them all behind.

25. All the way up the river Lieut. Vreede made a rough survey with compass and rangefinder, from which they could have ascertained approximately their position when at Labang, more than two miles below the 4°20' N Latitude. This however was not done and their Leader ordered an advance to the Tagol, where astronomical observations were taken by Heer Schepers and the position found to be ten miles North of the Frontier, a return to Labang was at once ordered. On their journey down from the Tagol three boats were upset with the loss of all their contents including a considerable quantity of valuable property. Their occupants had narrow escapes.

26. The next step was to set up an observation station at Labang and to fix accurately its position, work for which clear nights were essential: every night however the sky was clouded and no astronomical observations were possible. Resort therefore was had to solar observations, which fixed the position as being 2½ miles South of parallel 4°20' North.

27. Questions now arose as to the interpretation of the Convention regulating the Boundary and we considered it advisable to get into communication with H. E. the Governor at Sandakan. There was insufficient transport to permit of both of us accompanying the party detailed for the survey of the Selalir and we decided that Mr. Keddell should go with them while Mr. Bunbury should proceed to Bmadon, for which place he started on the 22nd July, making his own arrangements for transport. He expected to be able to meet the survey party on the Selalir after receiving a reply to telegram from Sandakan.

28. The survey party left Labang for work on the Selalir on the 25th July, Caytain Stort having gone two days in advance to arrange transport: Heer Schepers was in charge of the survey between Labang and Lumbis, the first tributary of importance when ascending the Selalir, to reach which it takes two days by boat. Beyond the Lumbis Lieut. Vreede and Mr. Keddell were to conduct the survey, with Lieut. van der Gant in charge of transport.

29. The Dutch interpretation of the Treaty being to the effect that they could claim any river the most northerly point of whose basin was South of parallel 4°40' N. L. - adopting the German Geographical mile, equal to four nautical miles, - the object of their survey was to fix the most northerly point of the basin, and so long as this was shown to be below the 4°40' NL. they held that they had shown that river to be within their territory and that nothing further was necessary. After leaving Lumbis Mr. Keddell fell sick and was compelled to return to camp at Labang leaving Lieut. Vreede to conduct the survey alone. The Kabu, a

a tributary on the true left, was found to run farther North than the main river, the source of the former being in Latitude $4^{\circ}27'$ N. and of the latter $4^{\circ}22'$ N. Accordingly the Dutch considered that the whole of the Selalir was included in their territory. The question of the true interpretation had then been referred to the Court of Directors and we were not in a position to demand that anything further should be done regarding the survey or marking of the river. Mr. Bunbury returned from Rundom across the Tagol and by way of the Selalir, following the route taken by Lieut. Vreede, whom he missed by one day, the journey and the wait at Rundom having occupied from 22nd July to the 13th August.

30. The point of intersection of parallel $4^{\circ}20'$ N. L. with the Pensiangan (upper Sembakong) having been fixed and marks placed there, Heer Schepers made a survey to the East to locate a ridge running between the Sementalun and Semtebel (tributaries of the Pensiangan) to the Sibuko watershed).

31. On the 16th Augst the Expedition left Labang camp on the return journey to Plajo which we reached on the 20th. Shooting the rapids involved the upsetting of three boats, the loss of a lot of property, including one of the circumferentors and all Lieut. Vreede's private effects, and the prolonged immersion of a case of chronometers.

32. From Plajo the Expedition moved in three detachments to the Sibuko in the s. l. "Sophia" and we reached Bembliangan, the trading station of the Sibuko, on the 6th of September, proceeding up river on the 7th to the next camp at Tenampak at the confluence of the Tulid (Sibuko) and the Ussalui (or Tampilan) which latter flows from Mount Bembuding.

33. At Tenampak observations were taken and a traverse made up the river to the mouth of the Agisan, a tributary on the true right.

Capt. Stort, who had been in poor health since the return to Plajo, had left for a trip to Bulongan early in the month, and no advance could be made until his return: Heer Schepers and Lieut. Vreede also had returned to Plajo for further observations. They all returned to Tenampak to rejoin the expedition on the 18th, Capt. Stort being still very poorly. He finally was compelled to return to Java on the 23rd September, the conduct of the Expedition devolving on Heer Schepers.

34. During the long delay at Tenampak Mr. Bunbury took a short excursion into the hills at the head of the Tempilan and in the neighbourhood of the intersection point of parallel 4°20' N. L. with Meridian 117° E.

35. On the 24th September Mr. Bunbury with one of the surveyors and Heer Munnikx de Jongh ascended Mt. Bombuding and proceeded to the North side, touching the source of the Sesui (a tributary of the Serudong, which in its upper reaches is called the Tembelunan) and then descended to the Kaundan, a tributary of the Sibuda (Sibuko), and passing to the North of Mount Meliat followed down the Kaundan and Sibuda till the mouth of the Agisan was reached on the 8th October. It should be explained here that the Sibuko river is named Tulid in its middle reaches and Sibuda upwards from Tenampak.

36. Meanwhile Heer Schepers with Lieut. Vreede and Mr. Keddell moved from Tenampak on the 4th October and established a camp at the mouth of the Agisan river which enters the Sibuda on the West about Lat. 4°15' N. Here again the sky at nights was unfavourable for observations and it was not until the 17th that progress could be made. On that day Lieut. Vreede and Mr. Bunbury went up the Agisan going for a short distance by boat and the following day starting to march farther North, the objective being to get a connection with the survey to the East of the Pensiangan and also to fix the most northerly point of the Agisan.

37. Leaving the Agisan the party crossed the Sibuko - Sembakong watershed and descended to the Sesantabel which enters the Sembakong below the mouth of the Salalir. Thence they crossed over to the Sementalun which flows into the Pensiangan a little below the Tagul. Going up the Sementalun they again crossed the watershed into the head waters of the Agisan and following down the latter reached the camp at its mouth on the 2nd November.

38. The next excursion to be undertaken had as its objective the fixing of the most northerly point of the Sibuda. A party consisting of Heer Schepers, Mr. Bunbury, Lieut. Vreede and Heer Munniks de Jongh set out on the 13th November and marched up the Sibuda fixing on the way the line of 4°20' N. Lat. on the river bank. They followed the river to the mouth of a small stream called the Nandiu, some fifteen miles in a northerly direction, and then ascended a hill about 3,000 feet above sea level, whence the necessary observations were taken.

39. On the return journey they left the Sibuda below the mouth of the Naundun (vide para. 35) and crossed a foothill of the Meliat into the Apat basin which drains into the Tampilan a little way above Tenampak, and so returned to Tenampak direct without calling at the Agisan camp. Tenampak was reached on the 25th November. Meanwhile Lieut. Vreede had to return to the Aigsan to fix the 4°20' line and set up a pillar there. On his return the remains of the camp at Ag'san were moved to Tenampak.

40. The next step was to move to the Simengaris and it was decided that part of the Expedition should march there by the foothills of the Bembuding Mountain, while the rest should return to Pembliangan by boat and proceed thence by Launch. This move was commenced on the 7th December when Mr. Bunbury, Lieut. Vreede and Heer M. De Jongh left the camp at Tenampak and marching up the Sibulu, a tributary flowing from the North East and debouching below the mouth of the Tampila, ascended the hill range running

running from Mt. Lumbuding between the Serudong and Sibuda waters. From here a long spur running in a South-Easterly direction between the Awasan (upper Simengaris) and the Simaja, one of its tributaries took them down to Simengaris village on the 17th December. On the way stations were cleared and the necessary observations taken to locate the Simengaris - Serudong watershed. At Simengaris the rest of the Expedition had assembled.

41. Lieut. Vreede made a short trip on the 20th with a surveyor to fix a small point in the Serudong-Simengaris watershed that had not been clearly observed on the last trip.

42. From Simengaris camp the whole Commission proceeded on the 27th December in the "Sophia" to the coast to inspect the coast end of the Boundary, returning to camp on the 29th. We called at Tawao and landed four of our police whom we returned to Head Quarters.

43. The first batch of convicts and escort was sent back to Bulongan on the 30th December and on the 6th January the remainder returned together with the boat coolies in the charge of Lieut. van der Gent, the end of the field work having been compelted and there only remaining further astronomical observations to be taken between Simengaris, Nonokan and Pembliangan. Near Sahepare and Lieut. Vreede moved from Simengaris to Pembliangan on the 7th January, whither we had proceeded them on the 30th December.

44. On the 20th January the four Commissioners left Pembliangan and went to Nonokan where observations were taken at night: we went the following day to Simengaris and Mr. Bunbury returned to Tawao. The three remaining Commissioners went to Nonokan on the 22nd and on t to Pembliangan on the 24th. Here they remained until the 31st after which they came to Tawao for the preparation of maps and other work.

45. The map was sufficiently advanced by the 17th January to be signed by all the Commissioners, on which date the Joint report of the Commissioners describing in detail the delimitation of the Boundary was also signed. On that day the Dut[illegible] Commissioners with their Medical Officer left finally [illegible]r Java.

THE BOUNDARY CONVENTION

46. The Boundary Convention, a copy of which is attached (Appendix A) was concluded in 1891 and defines the Frontier as starting from 4°10' N. Lat. on the East Coast of the mainland, after following that parallel across the island of Sebatik, and running in a North Westerly direction between the rivers Simengaris and Serudong up to the point where Meridian 117° E. Long. crosses the parallel 4°20' N. Lt., thence following westward that parallel until it reaches the watershed that divides the rivers flowing to the North West of Borneo from those that flow to the East.

47. Article II seemed to us ambiguous in its wording, and from such information as we have had at our disposal we have not been able to discover whether the respective Governments have even had occasion to decide as to what interpretation should be mutually accepted by them, though it was in connectionwith this Article that questions were raised in 1903, it being then urged on behalf of the British North Borneo Government that the frontier line after leaving the East Coast should be taken "due West" and not only, as was contended by the Netherlands Government and as was subsequently decided by the Foreign Office in London to have been the intention of the framers of the Treaty, "in a Westerly direction".

48. The ambiguous clause reads as follows:-

"it being understood that in the event of the Simengaris or any "other river flowing into the sea below 4010' being found on survey "to cross the proposed Boundary line within a radius of five "geographical miles the line shall be diverted so as to include

"include such small portions or bends of rivers within Dutch territory? We submit that the question that has arisen during the course of the present Commission's work has not arisen before, for in the first place we were given by the Chief Dutch Commissioner to understand that though he had applied to his Government for the accepted interpretation on which the Dutch Commission were to work he had been unsuccessful in obtaining such. Again, when we applied for guidance as to the true rendering of the Article in question we were given in August the interpretation which had been approved by the Court of Directors, which instructions were cancelled in October in consequence of advice having been received from the Foreign Office regarding the true interpretation.

49. In Mr. Bunbury's letter No:10 of 8th July addressed to the Honourable the Government Secretary, while we were at the mouth of the Selalir river, were advanced two alternative interpretations (a) that the point from which the five mile limit was to be measured was Lat. 4°10' on the East Coast, (b) that the five mile limit should apply along the whole frontier line from the East Coast to the prescribed mountain range in the West: and instructions were asked for. The confirmation by the Court of Directors of the interpretation to be adopted by us was received [illegible] at plajo on our return there after the completion of the survey operations on the Selalir. This rendering of the clause differed from both of those submitted by us, defining, as it did, the point from which the five mile radius should be taken as being the point of intersection of Mer. 117° E. Long. with par. Lat. 4°20' N. and no provision was made therein for deviation from the straight line so as to admit the employment of natural boundaries except along the theoretical line running North West and within the small area round the prescribed point. As mentioned in the preceding paragraph this interpretation was subsequently cancelled.

50. We should not have found it necessary to refer to Head

Quarters

Quarters for instructions, for we should have accepted the five mile allowance all along the line, had not the Dutch Commissioners insisted that the German geographical miles was applicable and was the one intended to be applied in the Treaty: they maintained that this was the international geographical mile. As the German geographical mile is the equivalent of four sea miles this would give them the right to the whole basin of rivers debouching on the East Coast below 4°10' N. Lat. whose most northerly points were not above 4°40' N. Lat. It is true that similar concessions have to be made by the Netherlands Government in the case of rivers debouching above 4°10' N. Lt. but turning southwards: but the concessions would all have been in their favour.

51. It was not until towards the end of September that the Dutch Chmmissioners referred the question to their Government in Java by a message despatched by wireless from Tarakan. The matter was apparently referred to the Government at the Hague for they did not receive a reply until the 25th November, this being to the effect that the British Geographical mile was to be understood in the reading of the Treaty. Their instructions now agreed with those issued to us in October and received by us in November, namely:) (1) that the English geographical mile was the one intended, (2) that the word "radius" meant "distance", and (3) that the five miles allowance was to be applicable all along the line from the East coast to the watershed of the West Coast rivers.

BOUNDARY DESCRIBED

52. We here give a rough description of the course taken by the frontier line, details of which will be found in the joint-report of the British and Netherlands Commissioners (appendix 3).

53. Across the Island of Sebatik the Boundary follows the parallel of 4°10' N. Latitude and is continued Westward along this parallel until half-way across to the mainland: it then turns in a South-Westerly direction and always keeping to the middle of the

channel

channel again turns to enter Trusan Tumbu, which is marked in the published map of the country as the southerly "Jino Soelan". This "trusan" is followed until the Trusan Sikapal is met on the Western side: this again is followed as far as the Southern limit of the Simengaris-Serudong watershed.

54. The true mainland has now been reached and so far as possible in conformity with the terms of the Treaty watersheds are employed as definitive of the Boundary, the first being that which divides the Simengaris from the Serudong: these rivers are in their upper reaches known as the Wasan and the Tambelunan respectively. Round the head of the Wasan the frontier is carried along ahigh mountain range, the Bambuding and Meliat mountains forming a natural barrier.

55. The Sibuko waters have now to be divided, and of this river two of its main tributaries, the Sibuda and the Agisan, rise at points above 4°25' N. Lat. The line therefore after leaving Meliat comes down and crosses the Sibuda and Agisan at 4°20' North Latitude, the points of crossing being marked by pillars.

56. It then passes westward over the hills that divide the Sibuko from the Sembakong waters and following the hills that divide the Sementalun from the Sementobel, two important tributaries of the Sembakong (here called the Pensiangan), it comes down to the Pensiangan river. For a short distance before and after crossing the river, on both banks of which pillars have been erected it follows a straight line along the parallel 4°20' N. L. Thus leaving the river it is carried Westward along the hills between the Temolasak and Selalir rivers and between the Tagol and Selalir rivers as far as a hill named Seelaten in the latter watershed, whence it descends to the Selalir which it intersects at 4°20' N. Lat. thus including the upper Selalir in British Territory.

57. From this last point of intersection, which owing to a misconception of the true rendering of the Treaty at the time of survey, was not marked by a pillar, the Boundary continues in a

westerly

westerly direction along the hills until it reaches the Padas watershed.

58. After this the Frontier line runs as described in the Boundary Treaty of 1891.

RESULTS

GENERAL

59. We cannot but contemplate with satisfaction the results of the survey now completed, for whereas it was suggested by the Dutch Authorities that the British North Borneo Government had been collecting taxes South of the frontier it has now been shown that this was not the case; on the contrary our Officers had hesitated to travel even as far South as the mouth of the river Tagol, within ten miles of the Frontier.

60. Our attention has been called to the large amount of jungle produce that is all the while being removed from the forests of British North Borneo and taken through Dutch ports where only are any Customs duties or Royalties levied, this being more especially noticeable as regards the upper Sibuko. In Article VII of the Frontier Convention provision was made for the unhindered collection of jungle produce by natives of Bulongan from the rivers of British territory South of Tawao, but though this concession being for fifteen years only lapsed in 1906 no properly organised steps have been taken to stop these inroads on the resources of our territory. In most cases no doubt such unlawful operations have been due to ignorance of the confines of Dutch territory, but now that these have been determined it is to be hoped that it will be possible to exercise some control over the removal of valuable commodities.

THE SEMBAKONG AND ITS TRIBUTARIES

61. On the Sembakong our sphere is considerably extended for whereas, as mentioned above, our Officers have refrained from pushing so far South as the mouth of the river Tagol the Frontier

is

is now fixed some ten miles below this. On the Selalir it has been generally felt that we had some claims and our police have on rare occasions visited the upper part of the river, but no definite control has been exercised and no taxes have been accepted from natives residing there though Poll tax has been tendered and our assistance has often been asked for in the punishment of hostile raids on the part of neighbouring villages.

62. The part of the Selalir that is now included in British territory is an unimportant acquisition and here the apportioning of the country in accordance with the Boundary Convention does not we submit produce the most satisfactory results, for this river basin, running approximately from East to West, does not lend itself well to subdivision. Desultory raids are still not unknown between rival villages in this area.

63. Other tributaries of the Sembakong (Pensiangan) flowing in from the true right - going downstream from the mouth of the Tagol - are the Tamalasak, Sibulu and Semaluhang. On the left are the Semengkulid, Semantalun, Semendalam, Semangsend, Seliman, Sebeluan and Semendapi. None of these have been visited from North Borneo since the time of Mr. Witte who was murdered by the natives in this neighbourhood. There is now no further danger of this nature.

SIBUKO

64. In its upper reaches the Sibuko divides into the Agisan to the West and the Sibuda to the East: of the former we get a stretch of some five miles and of the latter fifteen miles, so far as we are aware the upper Agisan has never been entered before by Europeans and the Sibuda only once, viz. by the Tenom-Tawao survey Expedition in 1906. Here again the necessary subdividing of rivers detracts from the clearness of definition of the Frontier.

SIMENGARIS

65. Towards the East the hills dividing the Serudong waters (British) from the Simengaris afford a very effective boundary. The balance of advantage accruing from the deviation of the theoretical line to follow the curves of rivers is against us, but is at the same time inconsiderable.

RESOURCES OF THE NEW TERRITORY

66. The upper parts of the Sibuko waters are unpolulated and in consequance the forests have been spared from being ruined, as is so often the case, by native agriculturists who only take from the land and leave no permanent cultivation.

67. On the Pensiangan (Sembakong) and its tributaries is a scattered population, all Muruts of the Tengalun tribe. Capt. Stort made a preliminary tour of inspection in 1911 to collect what data he could and from the results of this visit together with our own enquiries we gather that at the following places are houses each house as a rule constituting a village:-

(1)	Upper Selalir, British portion.	9 houses
(2)	T West of the Pensiangan.	
	Tamelasak	18 houses
	Bulu	5 "
	Between Bulu and the boundary	5 "
(3)	East of the Pensiangan.	
	Sementalun	12 "
	Semengawat	2
	Seliman	5 "
	Semendapi	4 "

68 These houses vary much in size, from a small hovel containing three or four people to the long houses over 50 yards long and containing over 20 rooms.

69. From the Pensiangan waters getah and rotan are exported, most of the produce being purchased by traders from Dutch territory who take it down in boats to Flajo, the township of the Sembakong, whence it is taken to Bulongan. At one trader's house near the Sementalun were found about a ton of rotan and 3 cwt of getah, the latter having been collected in three months we were informed.

70. From the upper Agisan also getah and rotan are taken to Pembliangan, the township of the Sibuko. The upper Sibuda and its tributaries produce the best quality of damar: rotan too is plentiful but is at present neglected in favour of the former owing to the great demand for damar. Dense virgin jungle covers the land surrounding the head waters of all these rivers.

711 No cattle are found in these districts and only a very few buffaloes, all of which have come originally from Keningau: some of these are taken as far as Plajo and Pembliangan, no export duty being collected. The difficulties of transport are great and the risk considerable, so that the price of a beast safely conveyed to these places is more than trebled.

72. Much of the country consists of good planting land especially on the Sibuda and its tributaries and in the neighbourhood of the sources of the Sapulut, Tuamut (Kinabatangan) and Tambelunan (Serudong), where is a lot of comparatively flat land, its inaccessibility at present however detracts from its value.

COMMUNICATIONS, PROVISIONING ETC:

73. We experienced some difficulty owing to absence of information prior to our departure from Sandakan regarding the probable duration of the expedition and what means of communicating with Sandakan we should have at our disposal. When we reached Plajo from Sandakan Captain Stort promised that the "Sophia", the Dutch Government launch attached to the expedition should pay a monthly visit to Tawao: subsequently however it was found that this arrangement could not be adhered to. We managed to obtain two consignments of provisionsfrom Sandakan, which were helped out with such things as were obtainable in Tawao. It was practically impossible to arrange for regular consignments as orders had to be sent two months in advance and we could form little estimate of the probable date of the completion of the work even at a later date when the expedition had returned to Plajo from the upper Sembakung:

this was the end of August and it was then estimated that the work would be finished by the end of November , i.e. after three months, whereas it lasted nearly double that time. For the police and our servants we were able to obtain provisions from the Dutch supplies.

PERMANENT MARKS

74. The following permanent marks were erected, being constructed of concrete and cement blocks embedded firmly in the ground, the upper parts standing about a foot above the ground and being two feet square.

Observation station, No.	1 at Plajo
ditto	2 at Labang
ditto	3 at Pembliangan
ditto	4 at Tenampak
ditto	5 at Agisan
ditto	6 at Simengaris
Boundary Pillar, No:	1 on the opposite banks of the Pensiangan river, 2 pillars.
ditto	2 on the Sibuda
ditto	3 on the Agisan.

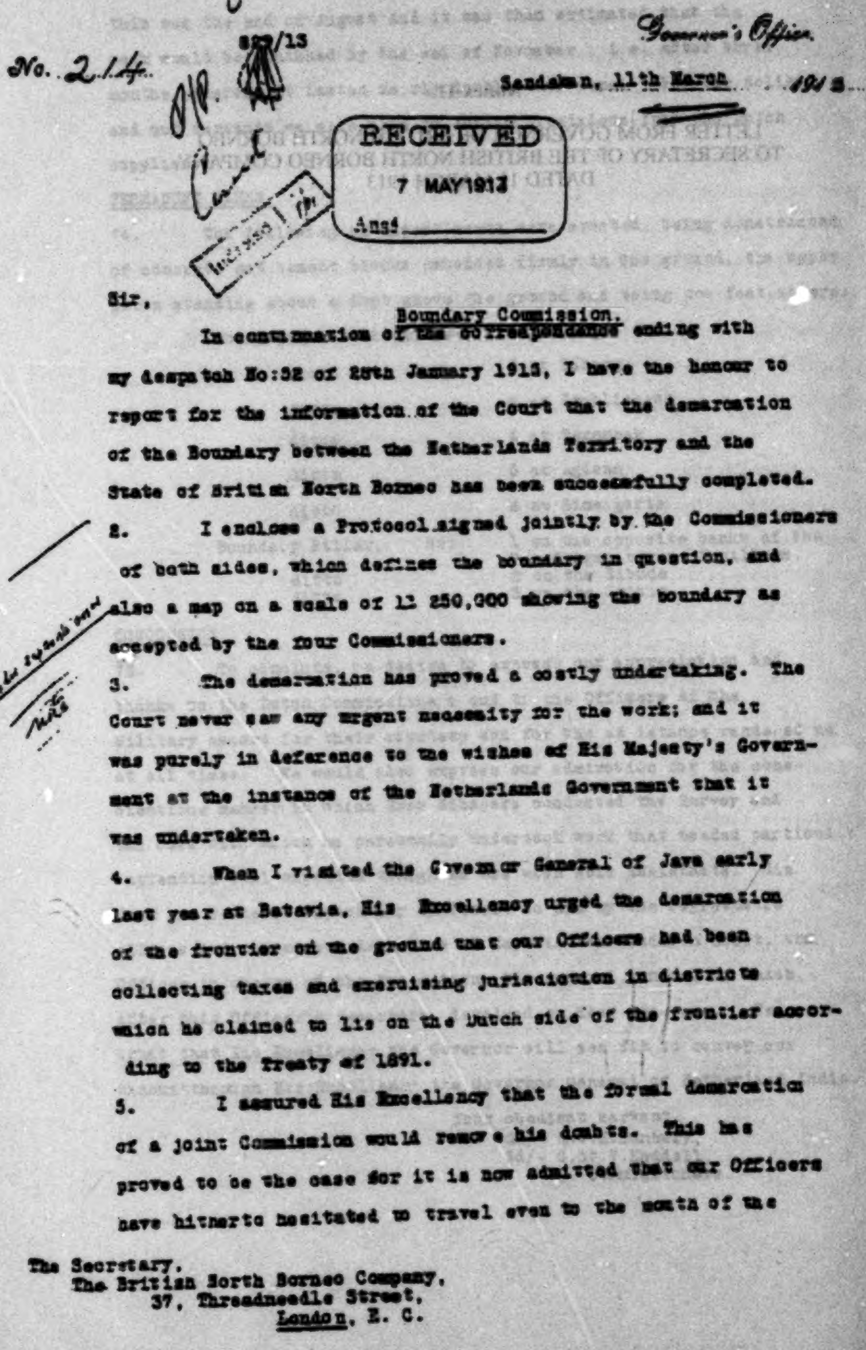
CONCLUSION

75. To conclude, we desire to express our appreciation and thanks to the Dutch Commissioners and to the Officers of the Military escort for their courtesy and for the assistance rendered us at all times. We would also express our admiration for the conscientious manner in which Heer Schepers conducted the Survey and the care with which he personally undertook work that needed particular attention well supplied though he was with able Assistants. His task was rendered especially difficult to him by the regrettable illness and consequent departure of Captain Van Genderen Stort, the Officer in charge of the Expedition, the general control of which, after this Officer's departure, devolved on Heer Schepers. We trust that His Excellency the Governor will see fit to convey our thanks through His Excellency the Governor General of Netherland India.

Your obedient servant,
Sd/- E.W.E.Bunbury,
Sd/- G.St.V.Keddell,
Commissioners.

Annex 11

LETTER FROM GOVERNOR OF BRITISH NORTH BORNEO TO SECRETARY OF THE BRITISH NORTH BORNEO COMPANY DATED 11 MARCH 1913



Governor's Office.

No. 214.

[illegible]/13

O/P. Council

Sandakan, 11th March 1913.

RECEIVED
7 MAY 1913
Ansd ________

Indexed

Sir,

In continuation of ~~the correspondence~~ Boundary Commission. ending with my despatch No:32 of 28th January 1913, I have the honour to report for the information of the Court that the demarcation of the Boundary between the Netherlands Territory and the State of British North Borneo has been successfully completed.

2. I enclose a Protocol signed jointly by the Commissioners of both sides, which defines the boundary in question, and also a map on a scale of 1: 250,000 showing the boundary as accepted by the four Commissioners.

Under separate cover

3. The demarcation has proved a costly undertaking. The Court never saw any urgent necessity for the work; and it was purely in deference to the wishes of His Majesty's Government at the instance of the Netherlands Government that it was undertaken.

4. When I visited the Governor General of Java early last year at Batavia, His Excellency urged the demarcation of the frontier on the ground that our Officers had been collecting taxes and exercising jurisdiction in districts which he claimed to lie on the Dutch side of the frontier according to the Treaty of 1891.

5. I assured His Excellency that the formal demarcation of a joint Commission would remove his doubts. This has proved to be the case for it is now admitted that our Officers have hitherto hesitated to travel even to the mouth of the

The Secretary,
The British North Borneo Company,
37, Threadneedle Street,
London, E. C.

Tagol river, within 10 miles of the frontier.

6. As will be seen from Mr. Bunbury's report the work of demarcation has been arduous accompanied by hardship, and entailed considerable loss of property and even the risk of life. I trust therefore that the way in which Mr. Bunbury and his Assistant, Mr. Keddell have performed their work will meet with the approval of His Majesty's Government. I would also ask that the Court may move the Foreign Office to convey to the Dutch Government their appreciation of the Courtesy shown towards our Officers by the Dutch Commissioners and of the assistance which was rendered to them at all times. The Government of British North Borneo share the admiration expressed by Mr. Bunbury for the conscientious manner in which Heer Schepers conducted his survey.

I also forward Mr. Keddell's report but have retained in this Office the voluminous calculation forms which accompanied it.

I have the honour to be,

Sir,

Your obedient servant,

Governor.

Annex 12

LETTER FROM FRANK KELLOGG, DEPARTMENT OF STATE TO SIR ESME HOWARD DATED 21 APRIL 1925

DEPARTMENT OF STATE
WASHINGTON

(COPY)

April 21st, 1925.

Excellency:

Adverting to this Department's notes of January 29, 1921, to Mr. Craigie, and of April 29, 1922, to Sir Auckland Geddes, regarding the desire of this Government that a new understanding be effected between the British and American Governments modifying the arrangement of 1907 with respect to the temporary administration of certain islands off the east coast of Borneo, I have the honor to request you to be so good as to inform me whether it has yet been found possible to come to any decision concerning this matter.

For the purpose of convenient reference I may say that the British Embassy's note No. 346 of May 4, 1922, stated that this Department's note of January 29, 1921, to Mr. Craigie, had been temporarily mislaid and requested a copy, which was transmitted in this Department's reply of May 13, 1922. On September 16, 1922, Mr. Peterson, Secretary of the British Embassy, addressed to Mr. Lockhart, of this Department, an inquiry regarding the question above mentioned, and reply was made on September 21, 1922, since which time it does not appear that there had been any correspondence on the subject between the British Embassy and this Department.

Since

His Excellency
The Right Honorable Sir Esme Howard,
G.C.M.G., K.C.B., C.V.O.,
Ambassador of Great Britain.

Since it is the desire of this Government to assume at present administration over only the seven islands mentioned in Mr. Lockhart's letter of September 20, 1922, to Mr. Peterson. namely: Boaan, Lihiman, Langaan, Great Bakkungaan, Little Bakkyngaan, Taganac and Baguan, it would seem preferable to provide for this by a modification of the existing agreement, if possible, rather than to proceed to a denunciation of the entire agreement in accordance with paragraph five of the temporary arrangement.

Accept, Excellency, the renewed assurance of my highest consideration.

(Sd) Frank B. Kellogg.

Annex 13

LETTER FROM DIVISION OF FAR EASTERN AFFAIRS, DEPARTMENT OF STATE TO THE SECRETARY OF STATE DATED 11 APRIL 1927, WITH ATTACHED LETTER FROM FRANK KELLOGG TO THE U.S. PRESIDENT

DEPARTMENT OF STATE

DIVISION OF FAR EASTERN AFFAIRS

JUN 20 1927
DIVISION OF FAR EASTERN AFFAIRS

Index Bureau
Received
MAY 15 1930
Filed 5/15/30
Dept. of State

April 11, 1927.

Mr. Secretary:

In 1907 a temporary agreement was reached between the United States and Great Britain by which the administration of certain islands (known as the Turtle Islands Group) located near the north coast of British North Borneo, was left in the hands of British North Borneo Company until the respective governments, by treaty, delimited the boundaries between their respective domains, or until the expiration of one year from the date of a notice of termination. This agreement was made because the United States was not at the time of its conclusion in a position to administer the islands in question.

~~In 1910, the Secretary of War~~ requested that the ~~limits of our territorial jurisdiction in the vicinity~~ of these islands be defined, the Government of the Philippine Islands being then in a position to administer them.

Since that date there has been correspondence with the Secretary of War and with the British Embassy in Washington in an effort to reach a modification of the existing temporary agreement (of 1907) which would place the

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the administration of the Turtle Islands under the Governor General of the Philippine Islands.

In a letter dated February 9, /27 1927, the Secretary of War enclosed a copy of a letter from the Governor General of the Philippine Islands, proposing that the boundary be definitely delimited. After considering the letter of the Governor General of the Philippines in connection with the proposal of the British Government (note from the British Embassy of April 21, /22 1926) it appeared that, although the proposal made to the British in the Department's note of January 29, /10 1921, recommended negotiations with a view to effecting an understanding modifying the 1907 temporary agreement, it would be preferable to endeavor to negotiate a permanent boundary treaty which, as provided in Article 5 of the 1907 agreement, would, upon its conclusion, replace the 1907 agreement, and a suggestion to this effect was made to the Secretary of War in the Department's letter of March 8, /27 1927. The letter of the Acting Chief of the Bureau of Insular Affairs of April 4, /31 1927, states that this proposal had been referred to the Governor General of the Philippines and that the Governor General concurs in the proposal of this Department.

A letter to the President asking for his authorization is attached hereto for your consideration.

SJEC:EB FE N.T.J.

The President:

In 1907 a temporary agreement was reached between the United States and Great Britain by which the administration of certain islands (known as the Turtle Islands Group) located near the north coast of British North Borneo, was left in the hands of the British North Borneo Company until the respective governments should, by treaty, delimit the boundaries between their respective domains. ~~or until the expiration of one year from the date of a~~ notice of termination. This agreement was made because it was not possible at that time to arrive at a definite agreement concerning the boundary between the possessions of the United States and Great Britain in that region, and for the further reason that the Philippine Government was not in a position to assume administration of the islands.

The President.

The White House.

~~[illegible] been possible to agree~~ on the islands which should be administered as a part of the Philippine group. Accordingly, since the British North ~~Borneo Company was administering the islands, this Govern-~~ ment accepted the proposal of the British Government that a temporary agreement be concluded, leaving the British North Borneo Company in undisturbed possession of the islands merely for purposes of administration, reserving all the rights of the United States, pending the final delimitation of the boundary.

In 1918, the Secretary of War requested that the ~~limits of our territorial jurisdiction in the vicinity of~~ these islands be defined, the Government of the Philippine Islands being then in a position to administer them. Since that date there has been correspondence with the Governor General of the Philippine Islands, the Secretary of War and the British Embassy in Washington in an effort to reach a modification of the existing temporary agreement which would place the administration of the Turtle Islands under

the

the Philippine Government. The British Government finally agreed to the proposed modification, on condition that as a consideration for the relinquishment by Great Britain of its claim to sovereignty over certain of the islands of the Turtle Group, the United States would agree (1) to permit the British North Borneo Company to operate a lighthouse which the Company had erected on Taganac Island, one of the islands of the Turtle Group; to accord the Company and its employees certain privileges in connection with the operation of the lighthouse, and (2) to maintain an effective police post on one of the islands.

The proposal of the British Government was communicated to the Governor General of the Philippine Islands through the Secretary of War, and the Governor General recommended that the boundary between the Philippine archipelago and British North Borneo be definitely defined as indicated on the chart which is attached hereto, and that following the settlement of the boundary, the temporary agreement of 1907 be denounced and the administration of the islands

found

found to belong to the United States be assumed by the Philippine Government. The Governor General agreed that, if necessary, the Philippine Government would purchase and maintain the lighthouse above mentioned, and also maintain an effective police post on one of the islands.

The action recommended by the Governor General of the Philippine Islands, in which this Department concurs, will necessitate negotiations with the British Government looking to the conclusion of a treaty delimiting the boundary under discussion, and accordingly, I should be grateful to be informed whether you desire that negotiations be undertaken with a view to the conclusion of such a treaty.

Respectfully submitted,

FRANK B KELLOGG

SR

MAY 20, 1927

JUN 18 1927

Enclosures: May 26, 1927
Charts.

JXC:EB FE SO

JKP M.T.J.

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COPY.

DEPARTMENT OF STATE,
WASHINGTON.

August 30th, 1927.

Excellency:

I have the honor further to refer to your note of April 21, 1926, in which you stated that the British Government agrees on certain conditions to the proposal of my Government for the assumption by the Philippine Government of the administration of certain islands on the east coast of Borneo which are now being administered by the British North Borneo Company in conformity with the Agreement concluded between the United States and Great Britain on July 10, 1907.

The conditions on which your Government expressed its willingness to agree to the proposal of the Government of the United States were communicated to the Philippine Government and that Government has expressed the view that instead of the proposed modification of the Agreement of 1907, placing some of the islands under the administration of the Philippine Government and leaving the boundary between the Philippine Archipelago and Borneo still definitely undetermined, it would be preferable that an agreement be concluded between the United States and Great Britain definitely determining the boundary, in accordance with paragraph 3 of the Agreement of July 10, 1907.

My/

His Excellency
The Right Honorable
Sir Esme Howard, G.C.M.G., K.C.B., C.V.O.,
Ambassador of Great Britain.

My Government concurs in the views of the Philippine Government and accordingly I have the honor to propose that the United States and Great Britain enter upon negotiations for the conclusion of a treaty to accomplish the definitive delimitation of the boundary.

The United States is prepared to agree that the boundary between the Philippine Archipelago and British North Borneo be as indicated in red ink on the accompanying charts (Nos. 4707 and 4720, published by the United States and Geodetic Survey) and described as follows:

"From the point of intersection of the parallel of four degrees forty-five minutes (4°45') north latitude and the meridian of longitude one hundred twenty degrees (120° 0') east of Greenwich, (being a point on the boundary defined by the Treaty between the United States of America and Spain signed at Paris, December 10, 1898), a line due south along the meridian of longitude one hundred twenty degrees (120° 0') east of Greenwich to its point of intersection with the parallel of four degrees twenty three minutes (4°23') north latitude;

thence due west along the parallel of four degrees twenty three minutes (4° 23') north latitude to its intersection with the meridian of longitude one hundred nineteen degrees (119° 0') east of Greenwich;

thence

thence due north along the meridian of longitude one hundred nineteen degrees (119°0') east of Greenwich to its intersection with the parallel of four degrees forty-two minutes (4° 42') north latitude;

thence in a straight line approximately 43°56' true (N. 43°56' E) to the intersection of the parallel of five degrees sixteen minutes (5°16') north latitude and the meridian of longitude one hundred nineteen degrees thirty five minutes (119° 35') east of Greenwich:

thence in a straight line approximately 314°19' true (N 45°41' W) to the intersection of the parallel of six degrees (6° 0') north latitude and the meridian of longitude one hundred eighteen degrees fifty minutes (118°50') east of Greenwich;

thence due west along the parallel of six degrees (6°0') north latitude to its intersection with the meridian of longitude one hundred eighteen degrees twenty minutes (118°20') east of Greenwich;

thence in a straight line approximately 307°40' true (N 52° 20' W) passing between Little Bakkungaan Island and Great Bakkungaan Island to the intersection of the parallel of six degrees seventeen minutes (6° 17') north latitude and the meridian of longitude one hundres seventeen degrees fifty eight minutes (117° 58') east of Greenwich;

thence/

thence due north along the meridian of longitude one hundred seventeen degrees fifty eight minutes (117° 58') east of Greenwich to its intersection with the parallel of six degrees fifty two minutes (6° 52') north latitude.

thence in a straight line approximately 315° 16' true (N 44° 44' W) to the intersection of the parallel of seven degrees twenty four minutes forty-five seconds (7° 24'45") north latitude with the meridian of longitude one hundred seventeen degrees twenty five minutes thirty seconds (117° 25' 30") east of Greenwich;

thence in a straight line approximately 300° 56' true (N 59°4' W) through the Mangsee Channel between Mangsee Great Reef and Mangsee Islands to the intersection of the parallel of seven degrees forty minutes (7° 40') north latitude and the meridian of longitude one hundred seventeen degrees (117° 0') east of Greenwich (the latter point being on the boundary defined by the Treaty between the United States of America and Spain signed at Paris, December 10, 1898)."

For purposes of comparison there has been plotted on the accompanying chart, No. 4707, the so-called "Durand Line" as shown on the map referred to in the Third Article of the Agreement of 1907.

It/

It will be observed that the boundary now proposed by the United States lies farther from Borneo than does the "Durand Line", except in the vicinity of the Turtle Islands, and in the portion of the 119th meridian where the two lines coincide.

With respect to the statement in your note under reference, that the British North Borneo Company has a good claim to Great Bakkungaan and Little Bakkungaan Islands, it will be observed that the boundary above described places Little Bakkungaan Island on the British side of the line. With respect to the desire of your Government to obtain for the British North Borneo Company a lease of an area on Taganac Island and certain privileges to insure the operation of the lighthouse now operated by the company on that island, you are informed that the Philippine Government is prepared to take over and maintain the lighthouse, and negotiations to that end would form part of the negotiations looking to the conclusion of the proposed treaty.

Should the proposal herein made meet with the approval of your Government, it is suggested that the negotiations be conducted in Washington.

Accept, Excellency, the renewed assurance of my highest consideration.

(Sgd.) Frank B. Kellogg.

Accompaniments:
Copies of charts.
Nos. 4707 and 4720.

Annex 15

LETTER FROM J.L. HUMPHREYS, GOVERNOR, SANDAKAN TO THE PRESIDENT OF THE BRITISH NORTH BORNEO COMPANY DATED 4 FEBRUARY 1929 WITH ATTACHED MEMORANDUM

THE BRITISH NORTH BORNEO (CHARTERED) COMPANY.

Government House,
North Borneo.
Sandakan, 4th February 1929.

No. 68.

Sir,

Islands claimed by the American Government.

I have the honour to refer to the correspondence ending with the Court's despatch No 928, dated 20th December, 1928, on the subject of the transfer of certain islands to American administration, and to the Court's cable dated 28th January, 1929, replying to my cable dated 22nd January, 1929, recommending that Mr. Fraser should represent us at Washington.

2. As requested I attach a Memorandum prepared by Mr. D.R. Maxwell, setting forth points that should be submitted on behalf of North Borneo.

3. It is possible that the United States of America might, if the case was skilfully represented take a generous view of the question and either cede these islands to North Borneo or at any rate allow them to remain for a further indefinite period under the jurisdiction of North Borneo.

4. It will be noted that the revenue from the Turtle Islands in question amounts to $4,210 per annum. It would be in the interests of the Chartered Company to offer at least $40,000 to purchase these islands from the United States of America. The revenue alone would represent a return of 10% on such sum. If the avoidance of administrative difficulties and friction is

The President,
The British North Borneo Company,
17, St. Helen's Place, London, E.C.3.

is taken into consideration it would be worth while offering a far higher figure. Failing other satisfactory settlement I recommend this course for the consideration of the Court.

5. It has been ascertained that about 326 acres of land on four of the Turtle Islands claimed by the United States of America have been alienated on permanent titles; the remaining titles are temporary.

I append details of these land alienations; it will be noted that they were made prior to the receipt of the Court's despatch No 354 dated 20th September, 1907, with which were enclosed copies of correspondence placing on formal record the arrangements under which this Government was allowed provisionally to retain control of the islands in question.

Titles	Date of alienation	Period	Approximate total acreage
Boaan Island			
26 Native Titles	1.6.1907.	In perpetuity.	146 acres
Lihiman Island			
7 Native Titles	1.6.1907	In perpetuity.	37 acres
1 Provisional Lease 2416	1.6.1907	999 years	13 acres
		Total	50 acres
Langaan Island			
4 Native Titles	1.6.1907	In perpetuity	12 acres
Bakungan Besar			
3 Provisional Leases	26.9.1903	999 years	118 acres.

If the forthcoming negotiations result in the United States of America assuming jurisdiction over these islands, the American Authorities would under the

the circumstances no doubt agree to allow these titles to stand on the terms on which they were issued by this Government.

I have etc.,

(Sgd.) J.L. Humphreys.

Governor.

MEMORANDUM.

I.

The legal claim (arising out of the Madrid Protocol of 1885) of the United States of America to certain islands off the coast of Borneo hitherto administered by this Government is not disputed.

Other aspects of the question should, it is submitted, be considered at the forthcoming negotiations for the delimitation of the boundary between the Philippine Archipelago and North Borneo.

With the exception of the Mangsi Group, mentioned in part IV of this Memorandum, the following observations refer to those islands of the Group known as the Turtle Islands that will come under the jurisdiction of the United States of America if the delimitation proposed by the American Government is accepted. The following, it is understood, are the islands of the Turtle Islands Group claimed by the United States of America:

Sibaung,
Boaan,
Lihiman,
Langaan,
Bakungan Besar,
Taganac,
Baguan.

The population of these seven islands is approximately 220 persons, of whom about 120 live on Taganac and about 50 on Boaan; the remaining 50 being distributed amongst the other islands.

These islands are mostly planted with coconut trees and also contain crops usual to native occupation.

The annual revenue is approximately as follows:

Turtle Egg Farm	$3,000
Quit Rents	420
Boat licences	120
Poll Tax	$ 70
Total direct revenue	$3,610

Brought forward	$3,610
Indirect revenue.	
Export duty on copra	600
Annual total revenue:	$4 210

II.

(A) Geographical propinquity. It cannot be reasonably disputed that the Turtle Islands belong geographically to North Borneo.

(B) Equity. It is not equitable merely to consider the legal aspect of old treaties drawn up long before local conditions were understood or fully appreciated. Sandakan is the natural import and export centre for these Turtle Islands and must continue so; to remove these Islands from the jurisdiction of this Government must result in hardship on the inhabitants who have always recognised and relied on this Government.

The decision regarding Palmas Island is submitted as being analogous. The following is understood to be the case; Palmas Island, situated about fifty miles south of Sarangani Point, Mindanao, had been controlled for many years by the Netherlands East Indies Government; although within the geographical limits of the Philippines it was awarded to Holland by the Hague International Court, the United States of America making no objection to its cession. Much more then, should the position of the Turtle Islands, which are admittedly outside the Philippine geographical limits, be generously considered by the United States of America.

(C) Opium smuggling. The United States of America have in the past declared that North Borneo was the source of Opium smuggling into the Philippines. On the admission

of

of their own representative at the Eleventh Session of the Advisory Committee of the League of Nations on Traffic in Opium and other Dangerous Drugs held at Geneva in April, 1928, it is stated that there has been no evidence of smuggling from North Borneo into the Philippine Islands during the last two years (by now practically three years).

The relevant portion of the Minutes is quoted in full for easy reference:-

> " Sir Malcolm Delevingne (British Empire) wished to raise a point that he had made at the last session. In its report for 1925, the Government of the United States of America had stated that British North Borneo was often the country of origin of opium smuggled into the Philippines. During the last few years, the authorities of British North Borneo had exercised the greatest vigilance and the Government of the United States on enquiry had found that no opium coming from North Borneo had been seized for at least two years. By some curious mischance, however, the statement reappeared in the report of the Government of the United States for the year 1926-27. Sir Malcolm added that the same statement had been made with regard to the Straits Settlements and that in this case also no evidence had been produced.
>
> Mr. Caldwell (United States of America) said that, as regards the statement referred to by the British representative, there had been correspondence with the British Government and the Governor-General of the Philippine Islands and the latter had stated that, during the last two years, there had been no evidence of smuggling into the Philippine Islands from British North Borneo. The report of the Government of the United States had been completed at too early a date to allow of the inclusion of this statement.
>
> Sir Malcolm Delevingne (British Empire) thanked Mr. Caldwell for his explanation".

(D) Administrative difficulties.

(i) Mutual Police difficulties. In a few hours natives or others can reach these Islands from the Mainland of Borneo and vice versa.

If

If extradition follows its normal lengthy channels, an intolerable situation might arise for both Administrations.

(ii) Customs difficulties. The inhabitants of these Islands will still have to buy and sell in Sandakan or on the coast of North Borneo; the copra produced from these Turtle Islands could hardly be disposed of in any other way.

(iii) Medical. In the case of epidemics or sickness inhabitants of these Islands must still rely on North Borneo for assistance.

(iv) Departmental Administration. The Judicial Land, and other Departments function easily on these Islands while under the jurisdiction of this Government; it is not probable that the corresponding Departments of the Government of the Philippine Islands could function as easily in Islands so distant.

III.

Apart from any desire to satisfy Filipino ambitions it is not clear what the United States of America can gain by taking over these Islands. Major-General McIntyre, when visiting Sandakan on 19th October, 1928, on his way to inspect the Islands, agreed that there would be undoubted difficulties in the administration of these Islands by the Government of the Philippines. It is submitted that these Islands are of little use to the United States or the Government of the

Philippines

Philippines. They are however of value to this Government inasmuch as their propinquity to the coast of North Borneo would make them, under foreign administration, a source of administrative difficulties to this Government.

IV.

Mangsi (Mangsee) Group. This group which lies to the North of Bangguey Island is just outside the line of delimitation proposed by the United States of America; the Group belongs geographically to Bangguey with its adjacent Islands. The principal island of the Group is usually planted by natives from Malundangan, an island situated close to Bangguey. These natives visit Mangsi island to plant, tend and harvest their crops but do not permanently reside there. It is submitted that the deviation of the line of delimitation to include the Mangsi Group within the jurisdictic of North Borneo would avoid hardship to natives accustomed to plant on this island without imposing any disadvantage upon the United States of America or the Government of the Philippine Islands.

V.

Apart from the Turtle Islands Group and the Mangsi Group the delimitation proposed by the United States of America does not appear to be inequitable.

Annex 16

FOREIGN OFFICE MEMORANDUM DATED 13 JULY 1929

196
A 4814
18 JUL 1929

MEMORANDUM.

On July 10th, 1907, an agreement was made with the United States regarding the administration by the British North Borneo Company of certain islands off the east coast of Borneo. Under this agreement the United States Government temporarily waived their rights to all islands situated southward and westward of an agreed boundary line, called the Durand Line, marked red on the annexed chart. It was further stipulated in the agreement that this should be without prejudice to a final delimitation of the boundary between Borneo and the Philippine Islands, and that the agreement could be terminated at a year's notice by either party. As a result of this agreement the North Borneo Company continued to administer all the islands which were at that time in dispute and actually several which were undoubtedly United States possessions.

No developments of any particular interest occurred in this matter until 1922, a year in which there was considerable agitation for Philippine independence which was accompanied by a desire on the part of the Filipinos for the return to the United States, or rather to Philippine jurisdiction, of certain of the islands in dispute. In the same year the United States Government pressed diplomatically for the surrender of seven islands, known locally as the Turtle Islands group. Investigation of the United States proposals revealed that there were no real grounds to warrant refusal to surrender any of these islands except two, to which the title was doubtful. It was eventually decided to compromise by merely seeking the right to maintain on one of these islands (Taganac) a lighthouse as an aid to navigation after it was transferred to American ownership. The North Borneo Company offered in return for this concession to raise no

objection/

objection to the transfer of the two doubtful islands to the United States. An offer on these terms was duly made to the United States Government. The State Department replied to this offer on August 20th by proposing a boundary, marked by a red line on the attached chart, and by undertaking to erect and operate a lighthouse on Taganac. The State Department also suggested that this might be regarded as the definite boundary between the Philippines and North Borneo and embodied in an agreement to take the place of that of 1907. After discussion with the Colonial Office, the Admiralty and the British North Borneo Company it was agreed to accept the boundary proposed by the United States Government, provided that the United States gave satisfactory assurances on three points: namely, the maintenance of a police post in one of the islands to be transferred to the United States; the application of Article 19 of the Washington Naval Treaty to the islands in question; and compensation in respect of the Taganac lighthouse. The United States Government were informed of the intention of His Majesty's Government to raise these three questions during the negotiations. To these points a fourth has now been added, namely, confirmation by the United States Government of titles to certain pieces of land in the Turtle Islands granted in perpetuity by the Government of North Borneo.

The United States Government duly appointed negotiators, but it was decided that in view of the fact that one of their representatives, General McIntyre, had personal knowledge of the locality, Sir Esme Howard would need expert assistance in the conduct of the negotiations. Some difficulty was experienced in finding a suitable man, but eventually Mr. Fraser, a retired official of the North Borneo Company who has had administrative experience in the district, agreed to

go/

go. The Company were anxious that the matter should be decided as soon as possible, but further delay occurred before it could be ascertained that the United States delegation would be available, and eventually Mr. Fraser arranged to sail at somewhat short notice.

Mr. Fraser leaves on July 13th, and instructions based on a memorandum drawn up by the North Borneo Company and approved by the Colonial Office were prepared for the guidance of Sir Esme Howard. This memorandum was submitted at a very late stage, and in it a point was raised which had not previously been considered. While the British North Borneo Company agreed that they had no legal title to the Turtle Islands, they hoped, for reasons which they fully explained in their memorandum, that the United States Government would permit the Turtle Islands to remain under the jurisdiction of the British North Borneo Company. The Company made no offer in their memorandum to give consideration for this concession on the part of the United States Government, but it is understood that they ~~would~~ will be prepared to give some pecuniary compensation if they are permitted to remain in possession of the Turtle Islands.

Since the United States Government have not been informed of the intention of His Majesty's Government to raise this point in the negotiations, some doubt was felt as to the propriety of raising it at this stage, and it has been left at the discretion of Sir Esme Howard to decide whether, and in what form, this point should be raised; should the United States Government, during the course of the negotiations, evince a disposition to consider a solution on these lines Sir Esme Howard has been asked to telegraph for further instructions.

In the event of the United States Government agreeing

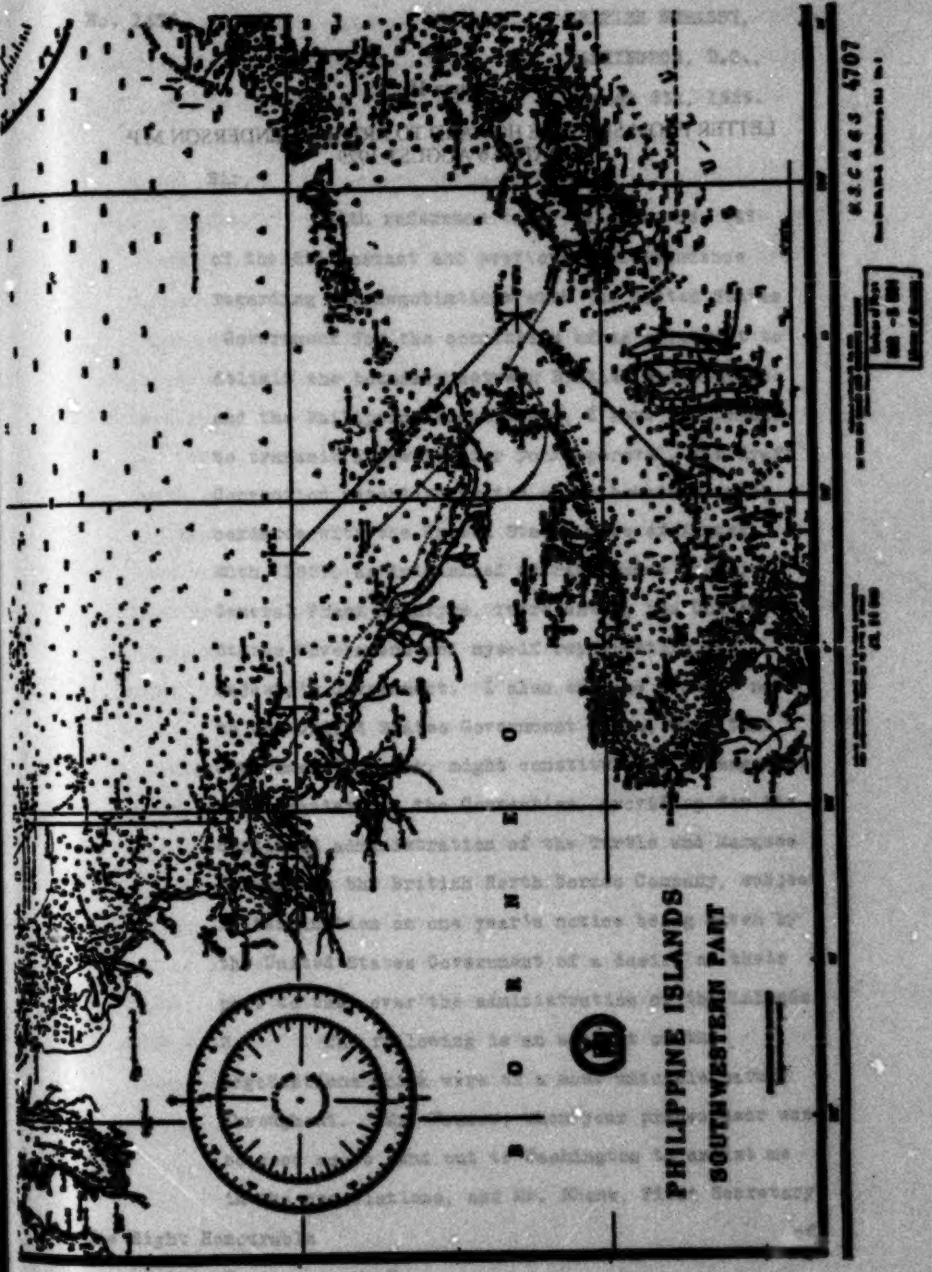
to/

to sell ~~these islands~~, the sale would involve the transfer of sovereignty over this small group of islands; the importance ~~of which~~ lies, I understand, mainly in their propinquity to Sandakan, the chief town of British North Borneo, the inhabitants of which use them as a pleasure resort.

FOREIGN OFFICE,
13th July, 1929.

Annex 17

COPY OF SECTION OF CHART OF PHILIPPINE ISLANDS, SOUTHWESTERN PART, H.O. CHART 4707


PHILIPPINE ISLANDS
SOUTHWESTERN PART
B O R N E O
U.S.C.&G.S. 4707

Annex 18

LETTER FROM SIR ESME HOWARD TO ARTHUR HENDERSON M.P. DATED 6 AUGUST 1929

No. 1476.

BRITISH EMBASSY,
WASHINGTON, D.C.,
August 6th, 1929.

Sir,

With reference to my telegram No. 349 of the 6th instant and previous correspondence regarding the negotiations with the United States Government for the conclusion of an agreement to delimit the boundary between British North Borneo and the Philippine Archipelago, I have the honour to transmit herewith, for your approval, the draft Convention establishing the above boundary in accordance with the United States note of August 20th, 1927, as initialled ad referendum by Major-General Frank McIntyre, representing the United States Government and myself representing His Majesty's Government. I also enclose a draft note to the United States Government which, with that Government's reply, might constitute an arrangement supplementary to the Convention, providing for the continued administration of the Turtle and Mangsee Islands by the British North Borneo Company, subject to termination on one year's notice being given by the United States Government of a desire on their part to take over the administration of the islands.

2. The following is an account of the negotiations which were of a most amicable nature throughout. Mr. Fraser, whom your predecessor was so good as to send out to Washington to assist me in the negotiations, and Mr. Shone, First Secretary of/

The Right Honourable
Arthur Henderson, M. P.,
Etc., etc. etc.

of His Majesty's Embassy, accompanied me to the various meetings with the United States representative, who was assisted by Mr. Jacob A. Metzger and Mr. John K. Caldwell of the Department of State.

3. As reported in my telegram No. 332 of July 26th, the first meeting on July 22nd was purely formal. Mr. Fraser and your despatch No. 1050 (A 4665/710/45) of July 18th last had only just arrived in Washington, and I wished to study the question more fully before initiating the discussions with the United States representative. As a result of this study, in consultation with Mr. Fraser, I decided that an attempt might be made in the first instance to induse the United States Government to agree to the cession, sale or lease of the islands to the British North Borneo Company. A memorandum was accordingly prepared setting out the arguments in favour of continued administration by the Company. A copy of this memorandum is enclosed.

4. Having been asked by General MacIntyre to open the proceedings at the second meeting on July 24th, I read this memorandum and handed copies of it to the United States delegates. General MacIntyre first alluded to the question of smuggling which he maintained had ceased chiefly owing to the high price of opium from North Borneo. Mr. Fraser said that this was not the only cause and that steps taken by the Government of North Borneo to suppress smuggling/

smuggling had been effective. In any case smuggling did not go on in the neighbourhood of the Turtle Islands, and to this the American representatives agreed.

5. The American representatives admitted that the islands were of little value and the revenue very small. The British statement of revenue was larger than they had estimated.

6. As regards the proposals in the memorandum the American representatives, while admitting that administration of the islands was easier from Sandakan than from Manila, took the view that cession or sale, and even lease of the islands to North Borneo would present insurmountable difficulties owing to the attitude in such matters of the United States Senate, and also, they led us to believe, to opposition on the part of the Philippine Government. They thought, however, that there would be no objection to some arrangement which would enable the North Borneo Government to continue to administer the islands for an indefinite period, provided that the boundary were definitely delimited in accordance with the proposal contained in the United States Note of August 20th, 1927, and that the arrangement in regard to administration were subject to termination at six months or perhaps a year's notice. They undertook to consider the British memorandum and then handed to me a draft treaty prepared in the State Department providing, inter alia, for the delimitation of the boundary as

above/

above, and for the transfer to the United States of any islands northward or eastward of the boundary within six months after notice had been given to His Majesty's Government by the United States Government of the desire that the transfer of administration should be effected. They added that there appeared to be no reason to anticipate that such a desire would be expressed at any rate in the near future. The United States draft treaty also contained a blank space for the insertion of an article providing for the application to the islands of the provisions of Article 19 of the Washington Naval Treaty of 1922.

7. The question of ownership of the Mangsee group of islands did not appear to have been considered by the American representatives in connection with the boundary delimitation. Indeed, they seemed to be unaware of the existence of those islands.

8. I emphasized the importance of the lighthouse on Taganak to the port of Sandakan and remarked that in the event of the Philippine Islands securing their independence, the Government of North Borneo might be concerned as to the efficient maintenance of the light. General McIntyre observed that the United States Government were prepared to take over the lighthouse and maintain it if and when the administration of the islands were transferred to the United States; the American draft treaty contained a stipulation to this effect. He added that the maintenance of the lighthouse would be guaranteed by the United States authorities at Washington./

Washington.

9. The meeting then adjourned to consider the proposals contained in the British memorandum and the American draft treaty.

10. At our third meeting on July 29th, the United States representatives informed us that they had submitted the British Memorandum to the Secretary of State. We gained the impression that the United States representatives were inclined to hold their ground more strongly than at the first meeting. It became clear at once that they were not prepared to agree to the cession, sale or lease to the Company of the islands, for the reasons given at the second meeting. Nevertheless they were ready to meet the Company to the extent of agreeing to allow the latter to continue to administer the islands subject to one year's notice of termination provided that the boundary as laid down in the United States note of August 30th, 1927 were definitely delimited by treaty.

11. We then raised the specific points on which the Company wished to obtain assurances, namely, the maintenance of a police post, compensation for the lighthouse on Taganak and the continuance of the titles to land granted prior to the exchange of notes between His Majesty's Government and the United States Government in 1907. These questions were discussed for some time and the attitude taken by the United States representatives was that they could be satisfactorily adjusted if and when the United States took over the administration/

administration but that it was unnecessary to have any written agreement about them. Their reason for this was evidently reluctance to commit the Philippine Government in case that Government attained its independence. With regard to the lighthouse, for instance, they retracted their previous statement that it would remain in United States control . in the event of the Philippine Government taking over the islands at any time. I then suggested that the United States Government might agree to take cognizance in an exchange of notes of the desires of His Majesty's Government and of the Company in respect to these three questions. Although one of the United States representatives remarked that we were asking them to lay down regulations for the administration of their own territory, it was agreed that a British note setting forth the above desiderata should be drafted for consideration at a further meeting.

12. I therefore instructed Mr. Shone to prepare with Mr. Fraser a draft convention and note; the former to consist of articles delimiting the boundary, applying to the Turtle and Mangsee Islands the provisions of Article 19 of the Washington Naval Treaty, and providing for ratification of the Convention; the latter to contain clauses relating to the continued administration of the islands by the British North Borneo Company, the transfer of such administration in the event of the United States expressing a desire to take

it/

it over, certain other stipulations which had been embodied in the United States draft treaty, and the three specific matters on which the Company sought assurances. These documents were drawn in practically the form which was finally agreed to. You will see that provision is made in the article of the Convention relating to the Washington Naval Treaty for the continued application of that article to the islands in the event of the transfer of the islands to a third party: and in the draft note, for the United States Government to commend to the favourable consideration of such third party the desires of His Majesty's Government and the British North Borneo Company in regard to the administration of the islands.

13. Before the final meeting with the United States representatives on August 2nd at which agreement on the texts of the Convention and note was reached, Mr. Fraser and Mr. Shone went over the drafts with Mr. Caldwell and Mr. Metzger of the State Department. The latter suggested a few minor verbal modifications; the only objections they raised were:

(1) to the word "favourable" qualifying the consideration to be given to the question of compensation for the lighthouse, (Clause 3 of the British draft note), on the ground that it entailed too definite an obligation on the part of the United States to pay ;

(2) to the word "ratification" in the

final sentence of the draft note (which was modelled on the British note of July 3rd, 1907), as a possible source of objection on the part of the United States Senate.

As to (1), Mr. Fraser and Mr. Shone were able to persuade the United States representatives that the word "favourable" should stand; as to (2) the word "ratification" was altered to "acceptance."

14. At our final meeting the United States Representatives accepted the draft convention and note but suggested the addition to the convention of an article providing that maps should be annexed to the instrument showing the course of the line established by Article 1 in order to avoid any difficulty arising in the future from a more accurate survey of the area in question. This article was inserted in the draft convention and numbered 2. They also proposed the insertion of an article (to be numbered 3) providing that all islands and rocks which the line might be found actually to traverse should belong to the Philippine Archipelago. Mr. Fraser did not consider that objection need be raised to this proposal and I accordingly agreed to it. The word "line" in article 1 was used in preference to "boundary" as the United States representatives considered the former more appropriate to a marine delimitation.

15. Mr. Fraser has expressed himself as satisfied that the convention and the proposed supplementary

arrangement/

arrangement by an exchange of notes represent the best terms that it was possible to secure in the circumstances for the British North Borneo Company and in this view I concur.

16. I would like in conclusion to express my great appreciation of the assistance afforded by Mr. Shone and Mr. Fraser and particularly of the excellent manner in which Mr. Shone drafted these articles of the Convention that required drafting as well as the note to the United States Government containing the desiderata of the North Borneo Company. I may add that it was at Mr. Shone's suggestion that I proposed that the provisional and subsidiary matters connected with the temporary administration of the islands should be dealt with by exchange of notes rather than embodied in the Convention itself, a proposal which at once commended itself both to His Majesty's Government and to the United States Government.

I have the honour to be,
With the highest respect,
Sir,
Your most obedient,
humble servant,

Esme Howard

Annex 19

UNDATED BNBC MEMORANDUM ENTITLED "NORTH BORNEO-PHILIPPINES BOUNDARY"

NORTH BORNEO - PHILIPPINES BOUNDARY.

(1) The British North Borneo Company have raised no objection to the above boundary being fixed in accordance with the proposals made by the United States Government in 1927, subject to consideration being given at the forthcoming negotiations to three points.

(2) These points are as follows:

(a) Establishment of a police post: The British North Borneo Company view with apprehension the difficulties which are likely to follow the transfer of the islands in the matter of suppressing piracy and arresting criminals escaping from or avoiding the jurisdiction of the North Borneo Government.

In past years there were numerous instances in which gangs of pirates used these islands as a base from which to attack Chinese junks passing between Sandakan and other North Borneo ports, and on these occasions the gangs were broken up by police patrols from Sandakan which visited and searched each island in turn. In more recent times the islands have been free from trouble of this description, having been placed under the charge of a native chief responsible directly to the District Officer at Sandakan.

As regards escaping criminals from Sandakan Town and District it is to be remembered that the Turtle Islands can be reached by a native canoe, with a favouring wind, in the course of two or three hours from Sandakan Harbour. The British North Borneo Company strongly 'represent,' therefore, the importance of establishing an effective police post on one of the islands with facilities for patrolling the group, in order that persons required by the North Borneo Government for extraditable offences may be promptly arrested and held on provisional warrants pending the completion of extradition proceedings and the receipt of formal warrants of surrender.

The Company suggest that it would be equally to the advantage of the Government of the United States to establish and maintain such a post in order to prevent the group of islands in question from becoming not only a possible refuge for malefactors but a base of operations for persons engaged in illicit traffic and consequently a source of embarrassment to both Governments.

(b) Application of Article 19 of the Washington Naval Treaty. This Article prohibits, with certain exceptions, the construction of new fortifications or naval bases in the Pacific. In this connection it should be borne in mind that the proposal of the United States Government to assume administrative control of Taganac and other islands close to Sandakan is made on behalf of the Philippine Government, and that the United States of America may at some future date recognise the independence of the Philippines. The possibility of the Philippine Government disposing of the islands to another Power cannot be overlooked; and although it seems clear that, in such an event, the islands would remain subject to the restrictive provisions of Article 19, the British North Borneo Company would be reassured if the United States Government would give an undertaking that the grant of independence or any future transfer to a third state would be subject to the observance of those provisions.

(c) Compensation for the Taganac Lighthouse: Notwithstanding Article 6 of the Exchange of Notes of 1907, (whereby "in case of denunciation" the United States Government

Government would not be responsible for the value of any buildings or improvements erected by the British North Borneo Company on the islands), the Company presume that matters to be discussed at the Washington negotiations will include the determination of an amount payable to them as compensation for the Taganac lighthouse.

The lighthouse being of international utility it is considered unlikely that the Government of the United States would dispute the claim of the Company to be reimbursed the capital cost of the erection of the light.

Were the United States to adopt the attitude that no compensation is due, the British North Borneo Company would have to consider the removal of the light, but they would be loth to take this course as its value to shipping would be very greatly decreased were it to be erected at any other point under their jurisdiction. In this connection, the following figures of expenditure incurred in the erection of the lighthouse are submitted:

1.	Cost of lamp, supplied by The Gas Accumulator Co. Ltd., Brentford.	$8,181.43
2.	Freight and Insurance on above	358.00
3.	Cost of supervision of erection	1,358.30
4.	Cost of labour employed in erection	1,883.81
5.	Cost of materials used in erection	898.01
6.	Transport expenses incurred in erection	455.00
		$13,134.55

Equivalent in sterling at 2/4d.
to the dollar - £1,532.7.3

3. Taganac Island is much used by the European population of Sandakan as a rendezvous for bathing and picnicing parties, and as such constitutes one of the amenities of the town. It is suggested that in the event of the island passing under the control of the United States Government, free access might be permitted for the purpose of such excursions.

4. There is a further point which will need to be discussed at the negotiations. Under Article 2 of the Exchange of Notes of 1907 it was laid down that no grants or concessions in the islands in question should extend beyond the term of the temporary occupation of the British North Borneo Company. The Company have recently been informed by the Governor that prior to that date about 326 acres of land on four of the Turtle Islands claimed by the United States were in good faith alienated on permanent titles; this alienation took place before the Exchange of Notes was concluded in 1907 and the Governor apprised thereof. Details are appended; if the forthcoming negotiations result in the United States of America assuming jurisdiction over these islands, the American authorities would under the circumstances no doubt agree to allow these titles to stand on the terms on which they were issued by the Government of North Borneo.

Titles

Titles	Date of Alienation	Period		Approximate total acreage
Bosan Island				
26 Native Titles	1.6.1907	In perpetuity		146 acres
Lihiman Island				
7 Native Titles	1.6.1907	In perpetuity		37 "
1 Provisional Lease 3416	1.6.1907	999 years		13 "
			Total	50 "
Langaan Island				
4 Native Titles	1.6.1907	In perpetuity		12 acres
Bakungan Besar				
3 Provisional Leases	26.9.1903	999 years		118 acres

5. It is possible that notwithstanding the acceptance of the proposals of the United States Government it may still be possible, through the courtesy of that Government, to secure a deviation of the proposed boundary so as to leave under the jurisdiction of the North Borneo Government the islands of the Turtle and Mangsi Groups.

In this connection, it is necessary to state that apart from the legal claim (arising out of the Madrid Protocol of 1885) of the United States Government, which is not disputed, considerations of geographical propinquity, equity, etc. arise which were understood by Major-General McIntyre when he visited Sandakan and the Turtle Islands in October last.

6. The following, it is understood, are the islands of the Turtle Islands Group claimed by the United States of America:

Sibaung,
Bosan,
Lihiman,
Langaan,
Bakungan Besar,
Taganas,
Baguan.

The population of these seven islands is approximately 220 persons who are practically all migrants from North Borneo. About 120 live on Taganas and about 50 on Bosan; the remaining 50 are distributed amongst the other islands. These islands are mostly planted with coconut trees and also contain crops usual to native occupation. The annual revenue is approximately as follows:

Turtle Egg Farm	$3,000
Quit rents	420
Boat licences	120
Poll Tax	70
Total direct revenue	$3,610
Indirect revenue	
Export duty on copra	600
Annual total revenue	$4,210

With

With reference to the principal item of revenue: "Turtle Egg Farm" it should be borne in mind that it is owing to the Chartered Company's supervision that any revenue at all is derived from this source.

7. The arguments in favour of the Turtle Islands remaining under the administrative control of the North Borneo Government are:

(a) Geographical propinquity. It cannot be reasonably disputed that the Turtle Islands belong geographically to North Borneo. It was generally accepted, from the time when the original grant was made by the Sultan of Sulu, that the Turtle Islands and certain others not actually within the limit of three marine leagues, were included in the cession, and no claim to assume control over them was ever made by Spain.

(b) Equity. It is submitted that it would not be equitable merely to consider the legal aspect of old treaties drawn up long before local conditions were understood or fully appreciated. Sandakan is the natural import and export centre for these Turtle Islands and must continue so; to remove these Islands from the jurisdiction of this Government must result in hardship on the inhabitants who have always recognised and relied on this Government.

The decision regarding Palmas Island is submitted as being analogous. The following is understood to be the case:

Palmas Island, situated about fifty miles south of Sarangani Point, Mindanao, had been controlled for many years by the Netherlands East Indies Government; although within the geographical limits of the Philippines it was awarded to Holland by the Hague International Court, the United States of America taking no objection to its cession. Much more, then should the position of the Turtle Islands, which are admittedly outside the Philippine geographical limits, be generously considered by the United States of America.

(c) Smuggling. The United States of America have in the past declared that North Borneo was the source of Opium smuggling into the Philippines. It is admitted that prior to the year 1914, when the Government of North Borneo assumed sole control over the sale of opium and prohibited its export, there was a certain amount of smuggling between North Borneo and the Philippines, though the extent to which the illicit traffic existed was greatly exaggerated. Since that date, owing to the special measures taken by the North Borneo Government to suppress smuggling and to the facilities granted to Philippines revenue-cutters to intercept and search suspicious native craft in North Borneo waters, the illicit traffic has to all intents and purposes ceased to exist. As to other forms of smuggling the extent to which they are practised is practically negligible; there has been some customs evasion by natives on both sides, principally in connection with jungle and sea produce, but such evasion has from a revenue point of view been of very slight dimensions.

Reverting to the subject of opium smuggling, it will be recalled that at the Eleventh Session of the Advisory Committee of the League of Nations on Traffic in Opium and other Dangerous Drugs held at Geneva in April, 1928, Mr. Caldwell, the United States representative, stated that there had been no evidence of smuggling from

North....

North Borneo into the Philippine Islands during the last two years (by now over three years).

It is moreover submitted that the acquisition of these islands by the United States Government with the sole object of suppressing opium smuggling - if it exists - would not achieve its purpose, seeing that the only practicable route for such smuggling is via intricate inland waters and Tambisan island.

(d) Administrative difficulties.

(i) Mutual Police difficulties. In a few hours natives or others can reach these Islands from the Mainland of Borneo and vice versa. If extradition follows its normal lengthy channels, an intolerable situation might arise for both Administrations.

(ii) Customs difficulties. The inhabitants of these Islands will still have to buy and sell in Sandakan or on the coast of North Borneo; the copra produced from these Turtle Islands could hardly be disposed of in any other way.

(iii) Medical. In the case of epidemics or sickness inhabitants of these Islands must still rely on North Borneo for assistance.

(iv) Departmental Administration. The Judicial, Land, and other Departments function easily in these Islands while under the jurisdiction of this Government; it is not probable that the corresponding Departments of the Government of the Philippine Islands could function as easily in Islands so distant.

(e) General: Apart from any desire to satisfy Filipino ambitions it is not clear what the United States of American can gain by taking over these Islands. Major-General McIntyre, when visiting Sandakan on 19th October, 1928, on his way to inspect the Islands, agreed that there would be undoubted difficulties in the administration of these Islands by the Government of the Philippines. It is submitted that these Islands are of little material use to the United States or the Government of the Philippines. They are however of value to the North Borneo Government inasmuch as their propinquity to the coast of North Borneo would make them, under foreign administration, unwittingly a source of administrative difficulties to the North Borneo Government.

(8) Dealing now with the Mangsi (Mangsee) Group. this Group lies to the north of Bangguey Island and is just outside the line of delimitation proposed by the United States of America; the Group belongs geographically to Bangguey with its adjacent Islands. The principal island of the Group is usually planted by natives from Malundangan, an island situated close to Bangguey. These natives visit Mangsi island to plant, tend and harvest their crops but do not permanently reside there. It is submitted that the deviation of the line of delimitation to include the Mangsi Group within the jurisdiction of North Borneo would avoid hardship to natives accustomed to plant on this island without imposing any disadvantage upon the United States of America or the Government of the Philippine Islands.

(9)........

(9) Finally, the British North Borneo Company submit that it might be possible to persuade the United States Government to adopt a generous view of the matter and either cede these islands to North Borneo or at any rate allow them to remain for a further indefinite period under the jurisdiction of North Borneo; any such cession would naturally be subject to such financial and other terms and conditions as may be agreed.

Annex 20

EXCHANGE OF NOTES BETWEEN SIR ESME HOWARD AND MR. STIMSON DATED 2 JANUARY 1930

Sir Esme Howard to Mr. Stimson.

Sir, *Washington, January 2, 1930.*

By the convention concluded between the President of the United States of America and His Britannic Majesty for the purpose of delimiting the boundary between the Philippine Archipelago on the one hand and the State of North Borneo which is under British protection on the other hand, the sovereignty over certain islands which have for many years past been administered by the British North Borneo Company has been definitely recognised as pertaining to the United States of America. These islands which formed the subject of the arrangement effected by an exchange of notes between His Majesty's Government and the United States Government on the 3rd and 10th July, 1907,* are :—

1. Sibaung, Boaan, Lihiman, Langaan, Great Bakkungaan, Taganak, and Baguan in the group of islands known as the Turtle Islands.
2. The Mangsee Islands.

His Majesty's Government in the United Kingdom understand that the Government of the United States of America are prepared to conclude an arrangement in regard to these islands, supplementary to the above-mentioned convention, in the following terms :—

Firstly.—That the said company be left undisturbed in the administration of the islands in question unless or until the United States Government give notice to His Majesty's Government of their desire that the administration of the islands should be transferred to them. The transfer of administration shall be effected within one year after such notice is given on a day and in a manner to be mutually arranged.

* See Appendix.

Secondly.—That when the administration of any island is transferred in accordance with the foregoing the said Company will deliver to the United States Government all records relating to administration prior to the date of transfer.

Thirdly.—The United States of America shall not be responsible for the value of any buildings which have been or may be erected or other permanent improvements which have been or may be made in any island the administration of which is subject to transfer but any buildings or improvements erected or made by the administrative authorities prior to the transfer of administration may be removed provided the interests of the United States of America are not thereby injured. In the event, however, of the Island of Taganak being so transferred, the United States Government will give favourable consideration to the question of the compensation to be paid to the said company in respect of the capital expenditure incurred by the company in connection with the lighthouse situated on the island, and the United States Government will provide for the future maintenance of the lighthouse.

Fourthly.—That such privilege of administration shall not carry with it territorial rights, such as those of making grants or concessions in the islands in question to extend beyond the temporary occupation of the company; and any grant, concession, or licence made by the company shall cease upon the termination of the company's occupation.

The United States Government, however, take note of the desire of His Majesty's Government that the following titles to land in certain of the islands which were in good faith granted by the Government of North Borneo prior to the arrangement of 1907, be allowed to stand on the terms on which they were issued by that Government:—

Particulars.

Titles.	Date of Alienation.	Period.	Approximate Total Acreage.
			Acres.
Boaan Island—			
26 native titles	June 1, 1907	In perpetuity ...	148
Lihiman Island—			
7 native titles	June 1, 1907	In perpetuity ...	37
1 provisional lease, 2416 ...	June 1, 1907	999 years ...	13
			Total 50
Langaan Island—			
4 native titles	June 1, 1907	In perpetuity ...	13
Great Bakkungaan—			
3 provisional leases ...	Sept. 26, 1903	999 years ...	318

Fifthly.—It is agreed that the United States Government shall be exempt from responsibility in respect of acts done in or from any of the islands in question the administration of which has not been transferred to the United States.

Sixthly.—The stipulations of the extradition treaties between the United States Government and His Majesty's Government shall be applicable within the limits provided for in the exchange of notes which took place in Washington on the 1st to 23rd September, 1913,* to the islands in question and the United States Government take note of the importance which, in view of the proximity of the islands to North Borneo, the said company attach to the establishment and maintenance of an adequate police post thereon, in the event of the administration being transferred to the United States Government.

Seventhly.—In the event of the cession, sale, lease or transfer of the islands in question to any third party, the United States Government undertake to use their good offices in commending to the favourable consideration of such third party the desires expressed by His Majesty's Government in the United Kingdom and the British North Borneo Company, as set out in the preceding articles of the present arrangement.

I have the honour under instruction from His Majesty's Principal Secretary of State for Foreign Affairs to request you to be so good as to inform me whether the United States adhere to the terms of the arrangement above described and I shall be glad to receive an assurance from you at the time that this note will be considered by the United States Government as sufficient acceptance of the above arrangement on the part of His Majesty's Government in the United Kingdom.

I have, &c.
ESME HOWARD.

Mr. Stimson to Sir Esme Howard.

Department of State,
Washington, January 2, 1930.

Excellency,

In your Excellency's note of to-day's date you stated that His Majesty's Government in the United Kingdom understands that the Government of the United States of America is prepared to conclude an arrangement in the following terms regarding certain islands off the coast of Borneo which have been administered by the British North Borneo Company in accordance with the arrangement effected by an exchange of notes between His Majesty's Government and the Government of the United States of America on the 3rd and 10th July, 1907:—

Firstly.—That the said company be left undisturbed in the administration of the islands in question unless or until the United States Government give notice to His Majesty's Government of its desire that the administration of the islands should be transferred to it. The transfer of administration shall be effected within one year after such notice is given on a day and in a manner to be mutually arranged.

---

* "Treaty Series No. 1 (1914)" (Cd. 7149).

Secondly.—That when the administration of any island is transferred in accordance with the foregoing the said Company will deliver to the United States Government all records relating to administration prior to the date of transfer.

Thirdly.—The United States of America shall not be responsible for the value of any buildings which have been or may be erected or other permanent improvements which have been or may be made in any island the administration of which is subject to transfer but any buildings or improvements erected or made by the administrative authorities prior to the transfer of administration may be removed provided the interests of the United States of America are not thereby injured. In the event, however, of the Island of Taganak being so transferred, the United States Government will give favourable consideration to the question of the compensation to be paid to the said company in respect of the capital expenditure incurred by the company in connection with the lighthouse situated on the island, and the United States Government will provide for the future maintenance of the lighthouse.

Fourthly.—That such privilege of administration shall not carry with it territorial rights, such as those of making grants or concessions in the islands in question to extend beyond the temporary occupation of the company; and any grant, concession, or licence made by the company shall cease upon the termination of the company's occupation.

The United States Government, however, takes note of the desire of His Majesty's Government that the following titles to land in certain of the islands which were in good faith granted by the Government of North Borneo prior to the arrangement of 1907, be allowed to stand on the terms on which they were issued by that Government:—

Particulars.

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			Total 50
Langaan Island—			
4 native titles	June 1, 1907	In perpetuity ...	12
Great Bakkungaan—			
3 provisional leases ...	Sept. 26, 1903	999 years ...	116

Fifthly.—It is agreed that the United States Government shall be exempt from responsibility in respect of acts done in or from any of the islands in question the administration of which has not been transferred to the United States.

Sixthly.—The stipulations of the extradition treaties between the United States Government and His Majesty's Government shall be applicable within the limits provided for in the exchange of notes which took place in Washington on the 1st to 23rd September, 1913, to the islands in question and the United States Government takes note of the importance which, in view of the proximity of the islands to North Borneo, the said company attaches to the establishment and maintenance of an adequate police post thereon, in the event of the administration being transferred to the United States Government.

Seventhly.—In the event of the cession, sale, lease or transfer of the islands in question to any third party, the United States Government undertakes to use its good offices in commending to the favourable consideration of such third party the desires expressed by His Majesty's Government in the United Kingdom and the British North Borneo Company, as set out in the preceding articles of the present arrangement.

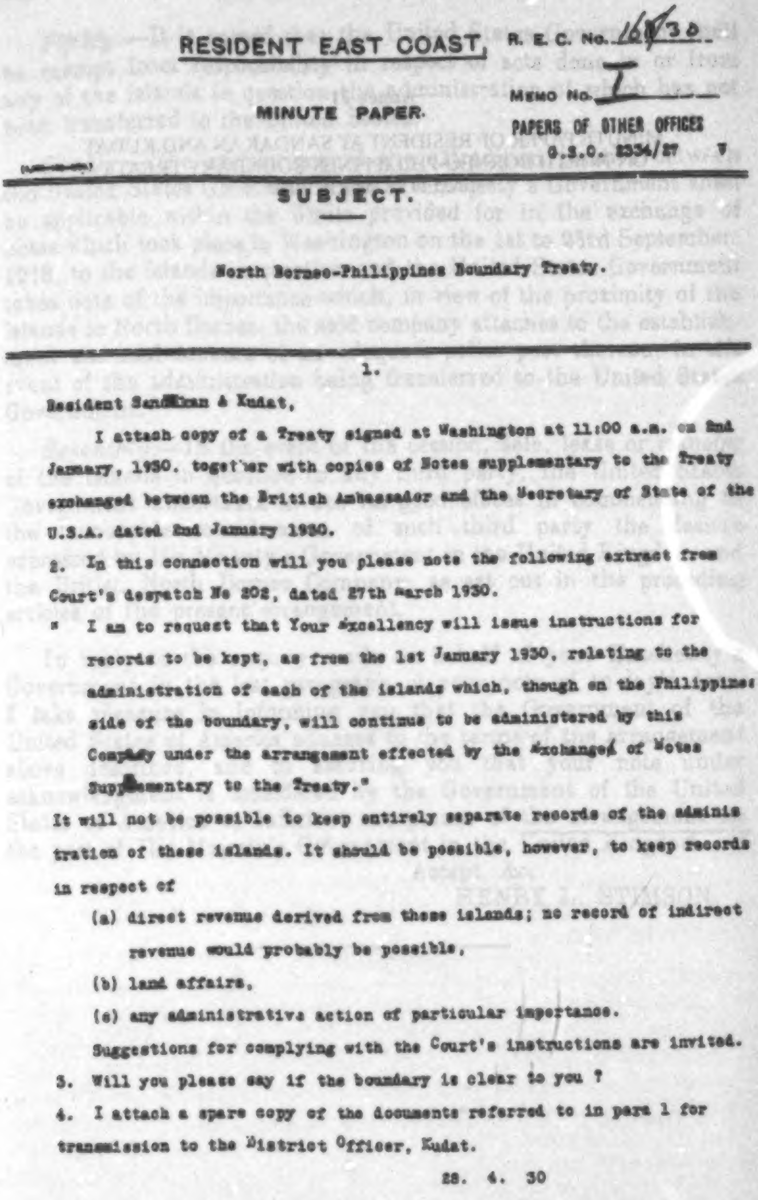
In reply to the enquiry made on behalf of your Excellency's Government in the last paragraph of your note of to-day's date, I take pleasure in informing you that the Government of the United States of America adheres to the terms of the arrangement above described, and in assuring you that your note under acknowledgment is considered by the Government of the United States of America as sufficient acceptance of the arrangement on the part of His Majesty's Government in the United Kingdom.

Accept, &c.

HENRY L. STIMSON.

Annex 21

MINUTE PAPER OF RESIDENT AT SANDAKAN AND KUDAT ON NORTH BORNEO-PHILIPPINES BOUNDARY TREATY DATED 28 APRIL 1930



RESIDENT EAST COAST, R. E. C. No. 16/30

MINUTE PAPER.

Memo No. I

PAPERS OF OTHER OFFICES
G.S.O. 2334/27

SUBJECT.

North Borneo-Philippines Boundary Treaty.

1.

Resident Sandakan & Kudat,

I attach copy of a Treaty signed at Washington at 11:00 a.m. on 2nd January, 1930. together with copies of Notes supplementary to the Treaty exchanged between the British Ambassador and the Secretary of State of the U.S.A. dated 2nd January 1930.

2. In this connection will you please note the following extract from Court's despatch No 202, dated 27th March 1930.

" I am to request that Your Excellency will issue instructions for records to be kept, as from the 1st January 1930, relating to the administration of each of the islands which, though on the Philippines side of the boundary, will continue to be administered by this Company under the arrangement effected by the Exchange of Notes Supplementary to the Treaty."

It will not be possible to keep entirely separate records of the administration of these islands. It should be possible, however, to keep records in respect of

(a) direct revenue derived from these islands; no record of indirect revenue would probably be possible,

(b) land affairs,

(c) any administrative action of particular importance.

Suggestions for complying with the Court's instructions are invited.

3. Will you please say if the boundary is clear to you ?

4. I attach a spare copy of the documents referred to in para 1 for transmission to the District Officer, Kudat.

28. 4. 30

II
ST 3

RESIDENT EAST COAST MINUTE PAPER.

PAPERS OF OTHER OFFICES
C.S.O. 2334/27

R. O. E. C. No.

SUBJECT.

1.

Resident Tawau

In continuation of Memo V which was despatched to you on 28. 4. 30 please note that line 4 of Article I of the Treaty should read "State of North Borneo which is under British protection " instead of "States in the Island of Borneo which are under British protection" Please amend your copy of Treaty accordingly.

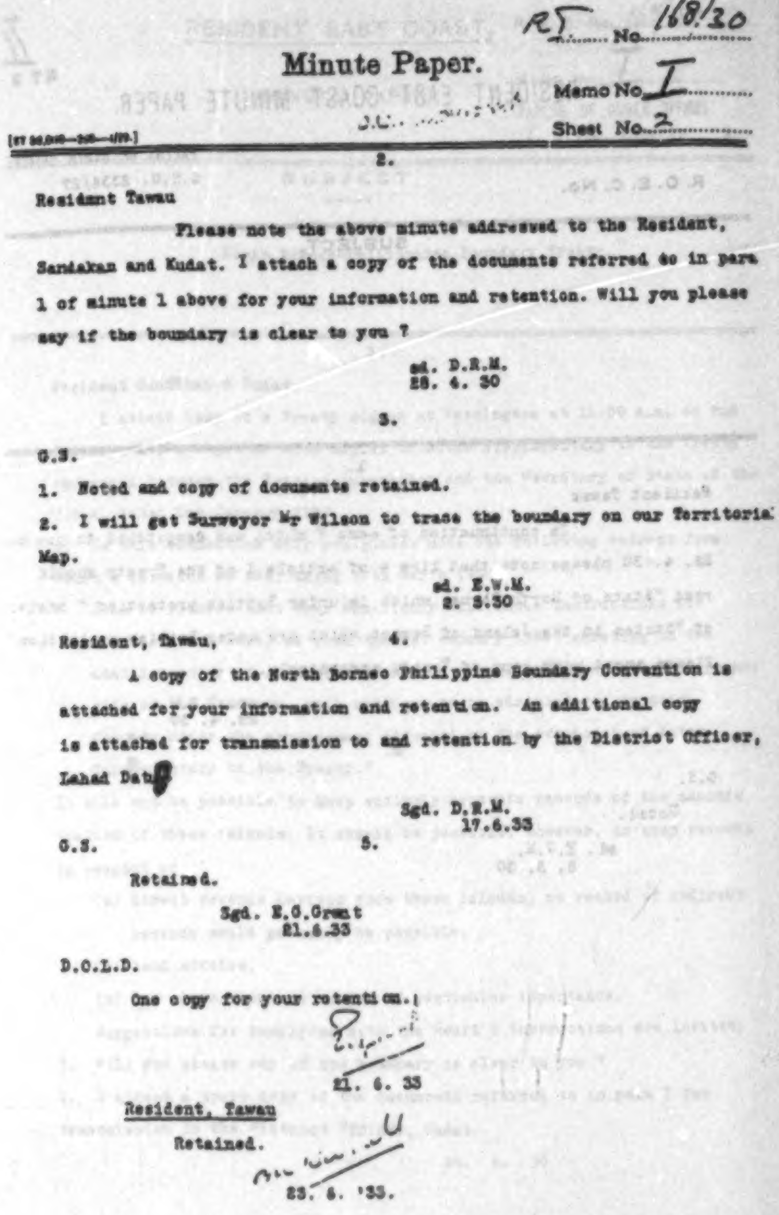
sd. D.R.L.
28. 4. 30

2.

C.S.

Noted.

sd. E.J.M.
8. 5. 30



RT No. 168/30

Minute Paper.

Memo No. I

Sheet No. 2

2.

Resident Tawau

Please note the above minute addressed to the Resident, Sandakan and Kudat. I attach a copy of the documents referred to in para 1 of minute 1 above for your information and retention. Will you please say if the boundary is clear to you ?

sd. D.R.M.
28. 4. 30

3.

C.S.

1. Noted and copy of documents retained.
2. I will get Surveyor Mr Wilson to trace the boundary on our Territorial Map.

sd. E.W.M.
2. 5.30

Resident, Tawau,

4.

A copy of the North Borneo Philippine Boundary Convention is attached for your information and retention. An additional copy is attached for transmission to and retention by the District Officer, Lahad Datu.

Sgd. D.R.M.
17.6.33

C.S.

5.

Retained.

Sgd. E.C.Grant
21.6.33

D.O.L.D.

One copy for your retention.

21. 6. 33

Resident, Tawau

Retained.

23. 6. '33.

Annex 22

NOTES OF TAWAU RESIDENT REGARDING APPLICATION BY CAPTAIN ORITA FOR A PERMANENT LEASE ON SI AMIL AND SOLE RIGHT TO OBTAIN BAIT ON CERTAIN ISLANDS OFF THE EAST COAST OF BORNEO,

MARCH-APRIL 1931

RT 142/31

DRAFT PAPER.

Fair Copy Signed by .... Date ....

To

M.S. 1
Or
21.3.31

Sir,

I have the honour to inform you that Capt. Orita of the Borneo fishing Co has interviewed me with reference to his tenure of land ~~at~~ on Si Amil Island & certain other matters.

2. His present holding is on T.O.L. subject to 6 mos notice -

3. As Govt. is aware this industry is in a most flourishing condition & Capt. Orita now desires to erect an ice factory on the island with an output of 3 tons per day in order to preserve his fish in fresh condition.

4. This must of necessity be a building of a permanent nature & Capt. Orita desires to obtain the whole island on a permanent lease or

DRAFT PAPER.

Fair Copy Signed by ______________ Date ______________, 19 .

To

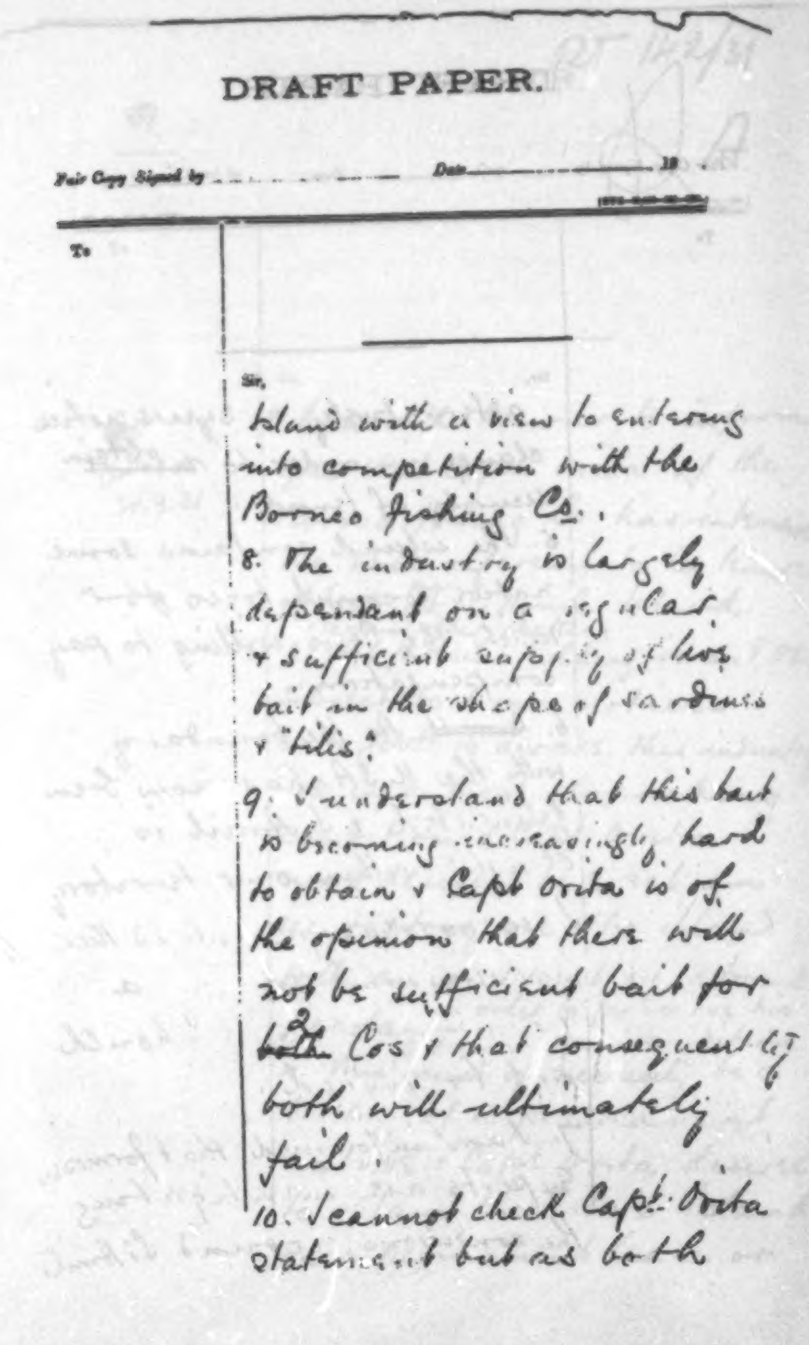
Sir,

alternatively a 3 years notice clause in order to ~~secure~~ obtain security of tenure.

5. The island contains some native coconut trees ~~for~~ which the Co is willing to pay compensation.

6. ~~[illegible]~~ As the boundary with the U.S.A. has now been delimited, & Si Amil is clearly within our territory I see no reason, unless there political reasons why a permanent lease should not be issued.

7. I am informed that Formosan experts are investigating the conditions around Si Amil



DRAFT PAPER.

Fair Copy Signed by ______ Date ______ 19 .

To

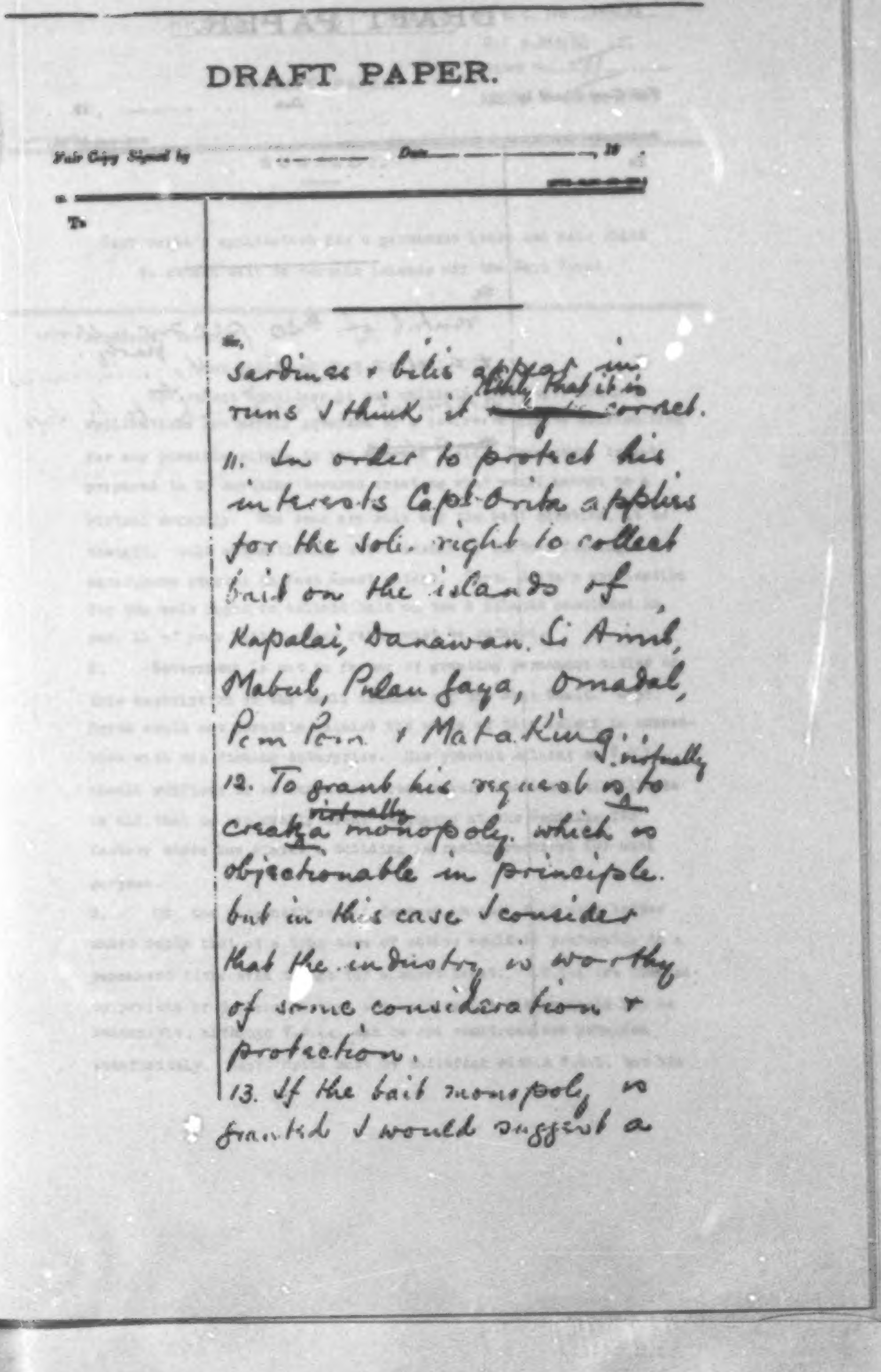
Sir,

Island with a view to entering into competition with the Borneo fishing Co.

8. The industry is largely dependant on a regular & sufficient supply of live bait in the shape of sardines & "tilis".

9. I understand that this bait is becoming increasingly hard to obtain & Capt Orita is of the opinion that there will not be sufficient bait for ~~both~~ 2 Cos & that consequently both will ultimately fail.

10. I cannot check Capt. Orita statement but as both



DRAFT PAPER.

Fair Copy Signed by Date 19

To

sardines + bilis appear in runs I think it likely that it is ~~[illegible]~~ correct.

11. In order to protect his interests Capt. Orita applies for the sole right to collect bait on the islands of Kapalai, Danawan. Si Amil, Mabul, Pulau Gaya, Omadal, Pom Pom + Mata King.

12. To grant his request is virtually to ~~virtually~~ create a monopoly which is objectionable in principle. but in this case I consider that the industry is worthy of some consideration + protection.

13. If the bait monopoly is granted I would suggest a

DRAFT PAPER.

Fair Copy Signed by ______ Date ______, 19 .

To

Sir,

rental of $30 per mensem
yearly
& a clause fixing the minimum
amount of dried fish to be shipped
~~in a year~~

BEST COPY AVAILABLE

RESIDENT EAST COAST,

MINUTE PAPER.

R. E. C. No. 142/31
G.S.O.872/31 II
MEMO No. II
PAPERS OF OTHER OFFICES

SUBJECT.

Capt. Orita's application for a permanent lease and sole right to obtain bait on certain islands off the East Coast.

Resident, Tawau, 1.

Your 142/31 of 21.3.31 (encl. 1).

Government considers it not unlikely that Capt. Orita's applications are merely prompted by a desire to create difficulties for any possible rivals in the fishing field. Government is not prepared to do anything towards creating what would amount to a virtual monopoly. The seas are wide and the bait question, it is thought, would automatically solve itself if further fishing enterprise started in East Coast waters. Capt. Orita's application for the sole right to collect bait on the 8 islands mentioned in par. 11 of your letter under reply must be refused.

2. Government is not in favour of granting permanent titles of this description on the small islands off the East Coast. Capt. Orita could not possible require the whole of this island in connection with his fishing enterprise. His present holding on T.O.L. should suffice; if he wants more room a very small additional area is all that he can really need. A glance at the Sandakan Ice factory shows how simple a building is really required for such purpose.

3. Of the alternatives put forward in par. 4 of your letter under reply that of a long term of notice would be preferable to a permanent title even though for a short least. T.O.L.s are limited to periods of 3 years so that a 3-year notice clause would not be reasonable, although T.O.Ls. can be and sometimes are extended indefinitely. Capt. Orita must be satisfied with a T.O.L. but the

R.T. No. 148/31

Minute Paper.

G.S.O.875-31 II

Memo No. II

Sheet No. 2.

[illegible]

term of notice may be increased from 6 months to one year.

Sgd. D.R.M.
1.4.31

G.S.,

8.

Noted.

Sgd. E.W.M.
8.4.31

D.O. Lahad Datu.

1. To see.

2. I believe that Capt. Orita is writing to you on the subject of obtaining further land on T.O.L.

EWM
10.4.31

Resident.

Sees.

1. Noted.

21.4.31

D.O.L. Datu.

Have you received any application from Capt Orita?

EWM
16.4.31

R.1.4. 15.5.31

Minute Paper.

A.T. No. 185/31
G.O.L.D. 82/31
Memo No. I
Sheet No. 2

[87 50,000—111—438.]

Dv. Lahad Datu.

Please note my letter of 31.3.31 to G.S.

7.4.31

Resident.

Datu.

8. " 31

FP.

Annex 23

RECENT DIPLOMATIC CORRESPONDENCE CONCERNING THE ACTIVITIES OF OILRIG SEDCO 601

No. AT 102/2000

The Ministry of Foreign Affairs, Malaysia presents its compliments to the Embassy of the Republic of Indonesia and wishes to express its grave concern with regard to the violation of Malaysia's Exclusive Economic Zone (EEZ) and Continental Shelf area by an Indonesian oil rig named Sedco 601 on 13 June 2000, approximately 35 nautical miles south of Pulau Sipadan.

The oil rig was first sighted on 13 June 2000 by a Royal Malaysian Air Force aircraft conducting aerial reconnaissance in the area when it observed an oil rig being towed by three(3) tow boats at 35 nautical miles south of Pulau Sipadan. Upon further investigation by the Royal Malaysian Navy, one of the tow boats namely the Highland Guide Houston, was seen dropping 8 buoys, shaped as a cylindrical 'T', forming a circle with a diameter of 2.52 nautical miles. The distance between each buoy is 1 nautical mile. The oil rig was in Malaysia's EEZ for 3 weeks until 4 July 2000.

The Malaysian Government would like to stress that its EEZ and Continental Shelf area is an integral part of the territory of Malaysia. This act of violating Malaysia's EEZ and Continental Shelf area, contravenes the 1982 United Nations Convention on the Law of the Sea. In this regard the Malaysian Government reiterates its grave concern over this incident and in the spirit of neighbourly relations and in the interest of peace, stability and security in the region, the Malaysian Government urges the Indonesian Government to prevent the occurence of any incident of a similar nature in the future.

The Ministry of Foreign Affairs, Malaysia avails itself of this opportunity to renew to the Embassy of the Republic of Indonesia the assurances of its highest consideration.

Ministry of Foreign Affairs
Kuala Lumpur

3 October, 2000

DEPARTMENT OF FOREIGN AFFAIRS
REPUBLIC OF INDONESIA

Unofficial translation

No. 1185 /PK/XI/'00/29

The Department of Foreign Affairs of the Republic of Indonesia presents its compliments to the Embassy of Malaysia and has to honour to refer to the letter dated 3 October 2000 from the Ministry of Foreign Affairs of Malaysia, to the Embassy of the Republic of Indonesia in Kuala Lumpur in which the Malaysian Foreign Ministry makes reference to the activities of the oil rig Sedco 601 on 13 June 2000 approximately 35 nautical miles south of Pulau Sipadan and states that such activities violate Malaysia's EEZ and Continental Shelf area.

On behalf of the Government of the Republic of Indonesia, the Department of Foreign Affairs has the honour to inform the Embassy as follows :

1. ***The activities of the oil rig Sedco 601 have taken place in maritime areas which appertain to the Republic of Indonesia and over which Indonesia exercises its sovereignty under the applicable principles and rules of international law including the 1982 United Nations Convention of the Law of the Sea.***

2. **The Indonesian Government recalls that, ever since 1966, both Indonesia and Malaysia have consistently recognised the 4° 10' N parallel of latitude extending seaward from the Island of Sebatik as the limit of their respective jurisdictions in the area for purposes of hydrocarbon exploration. Since that date, Indonesia has granted offshore oil and gas licenses in this area lying to the south of the 4° 10' N latitude while Malaysia's licenses have been limited to areas lying to the north of this latitude.**

3. The activities of the oil rig Sedco 601 referred to in Malaysia's letter of 3 October 2000 have taken place at the coordinates 3° 32' 24.46" N; 118° 39' 13.68" E; in other words, well to the south of the 4° 10' N parallel of latitude. These activities have been undertaken pursuant to a production sharing contract covering the Ambalat area signed on 27 September 1999 with respect to which there has been no previous Malaysian protest.

In these circumstances, the Government of the Republic of Indonesia takes the view that the Malaysian assertion that the Sedco 601 oil rig was operating in areas which are an integral part of the territory of Malaysia has no support in international law or based on the past conduct of Indonesia and Malaysia.

Moreover, the Government of Indonesia recalls that the dispute over the issue of sovereignty regarding the islands of Ligitan and Sipadan is presently the subject of proceedings introduced by Special Agreement by the two Parties before the International Court of Justice.

The Department of Foreign Affairs of the Republic of Indonesia avails itself of the opportunity to renew to the Malaysian Embassy the assurances of its highest consideration.

Jakarta, 21 November 2000

The Embassy of Malaysia
Jakarta

AT 128

The Ministry of Foreign Affairs Malaysia presents its compliments to the Embassy of the Republic of Indonesia and has the honour to refer to the Note No. 1185/PK/XI/00/29 dated 21 November 2000 from the Department of Foreign Affairs of the Republic of Indonesia.

The Government of Malaysia has sovereignty and jurisdiction over Pulau Sipadan and Pulau Ligitan and its surrounding Exclusive Economic Zone and Continental Shelf Limits. The two islands are part of Malaysian territory by virtue of Great Britain's transfer in 1963 to Malaysia, of its sovereignty over the territory of North Borneo, which included Pulau Sipadan and Ligitan.

The Government of Malaysia continues to hold that the 1891 Convention demarcated the boundary of Sarawak and Sabah with Kalimantan and that the Britain and the Netherlands boundary terminates on the east-coast of Sebatik Island at 4° 10'N latitude without any extension eastwards. The Government of Malaysia rejects any reinterpretation of the 1891 Convention by the Government of the Republic of Indonesia extending unilaterally the boundary beyond the east-coast of Sebatik along the 4° 10'N latitude thus making Pulau Sipadan and Ligitan and their surrounding waters a part of the territory of the Republic of Indonesia.

In the absence of a maritime boundary agreement between Indonesia and Malaysia for the area in question, the Government of Malaysia considers the Production Sharing Contract signed by Indonesia on 27 September 1999 as illegal and strongly protest Indonesia's act which intrudes into Malaysian sovereignty.

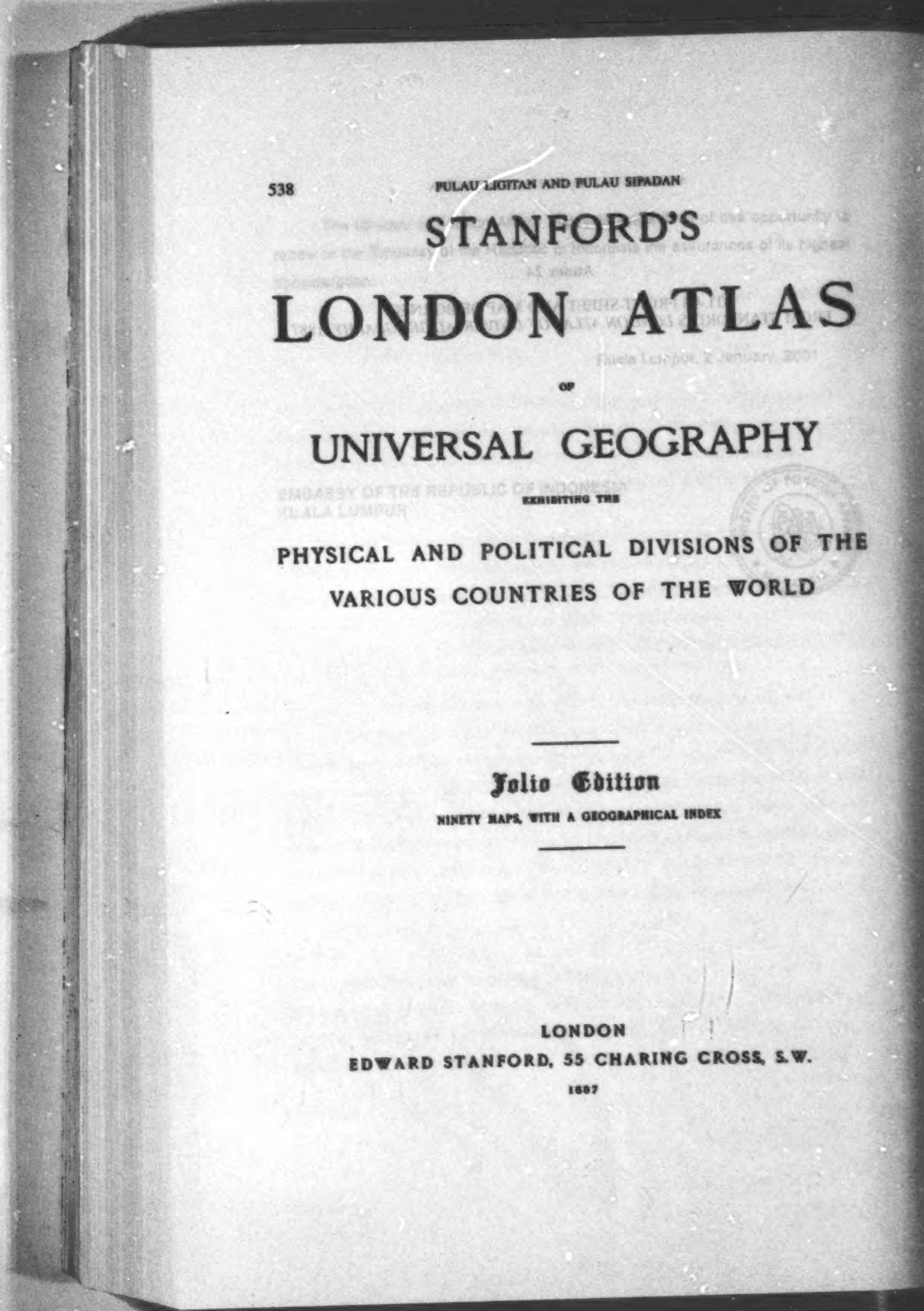
The Ministry of Foreign Affairs Malaysia avails itself of this opportunity to renew to the Embassy of the Republic of Indonesia the assurances of its highest consideration.

Kuala Lumpur, 2 January, 2001

EMBASSY OF THE REPUBLIC OF INDONESIA
KUALA LUMPUR

Annex 24

ATLAS FRONT-SHEET AND MAP OF BORNEO FROM STANFORD'S *LONDON ATLAS OF UNIVERSAL GEOGRAPHY*, 1887



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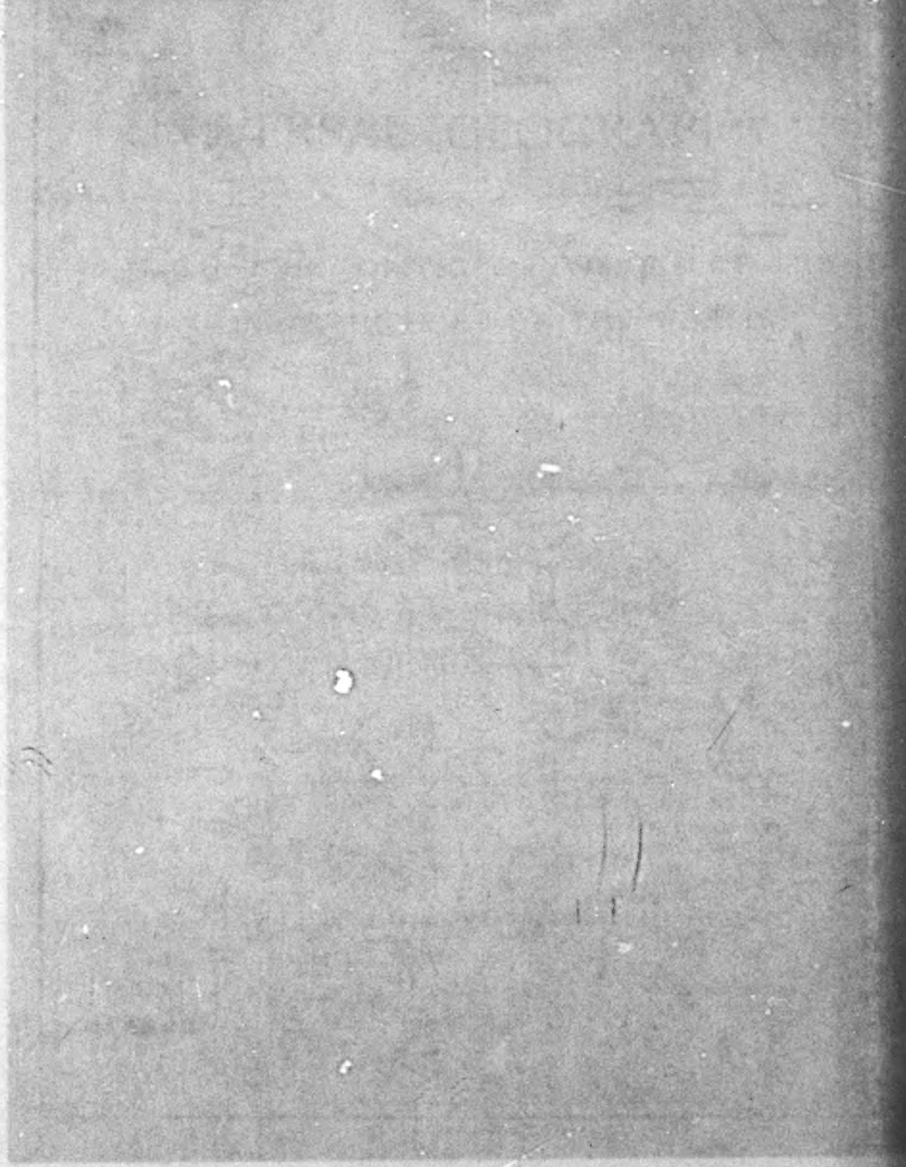
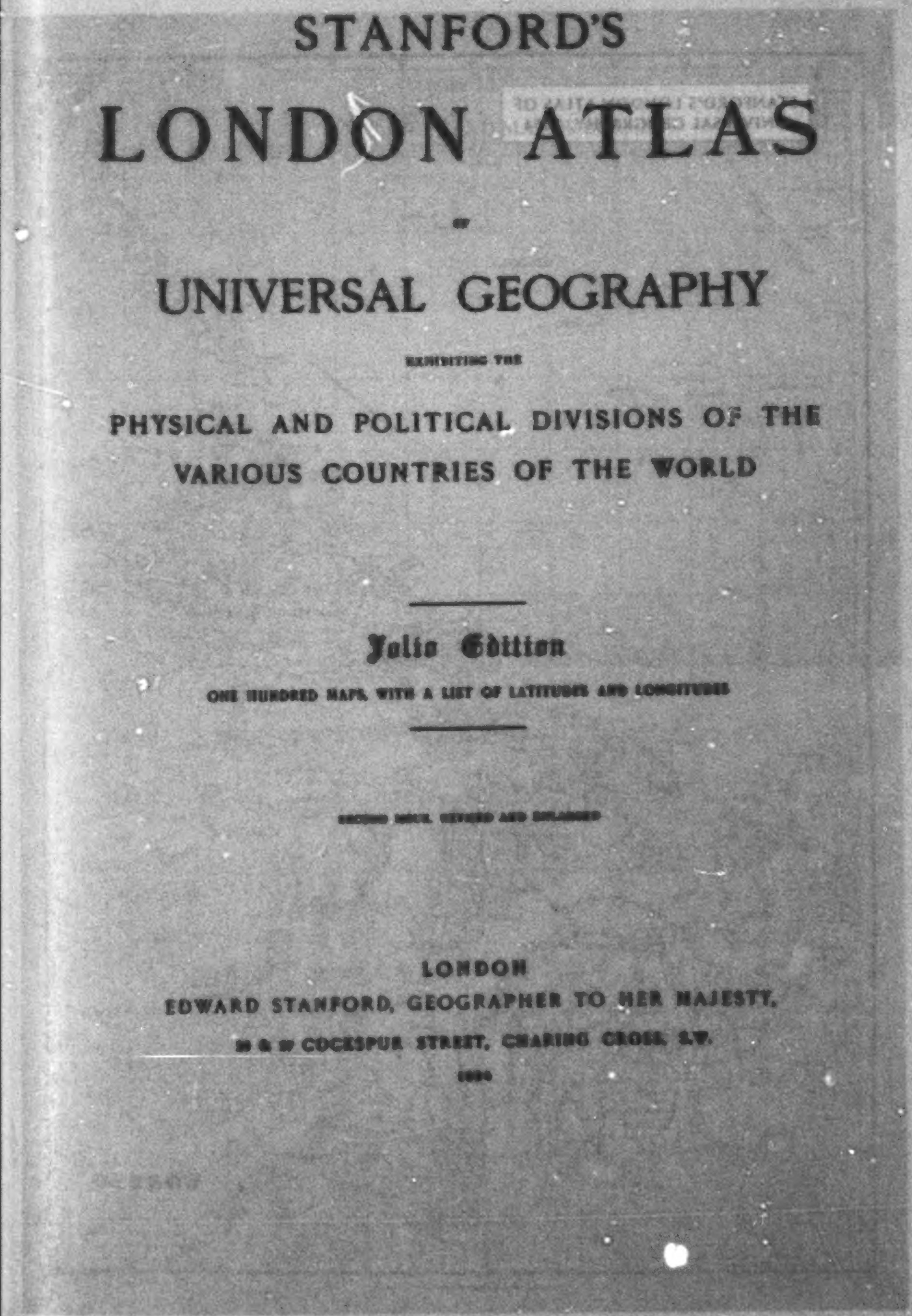
Annex 25

ATLAS FRONT-SHEET AND MAP OF BORNEO FROM STANFORD'S *LONDON ATLAS OF UNIVERSAL GEOGRAPHY*, 1894





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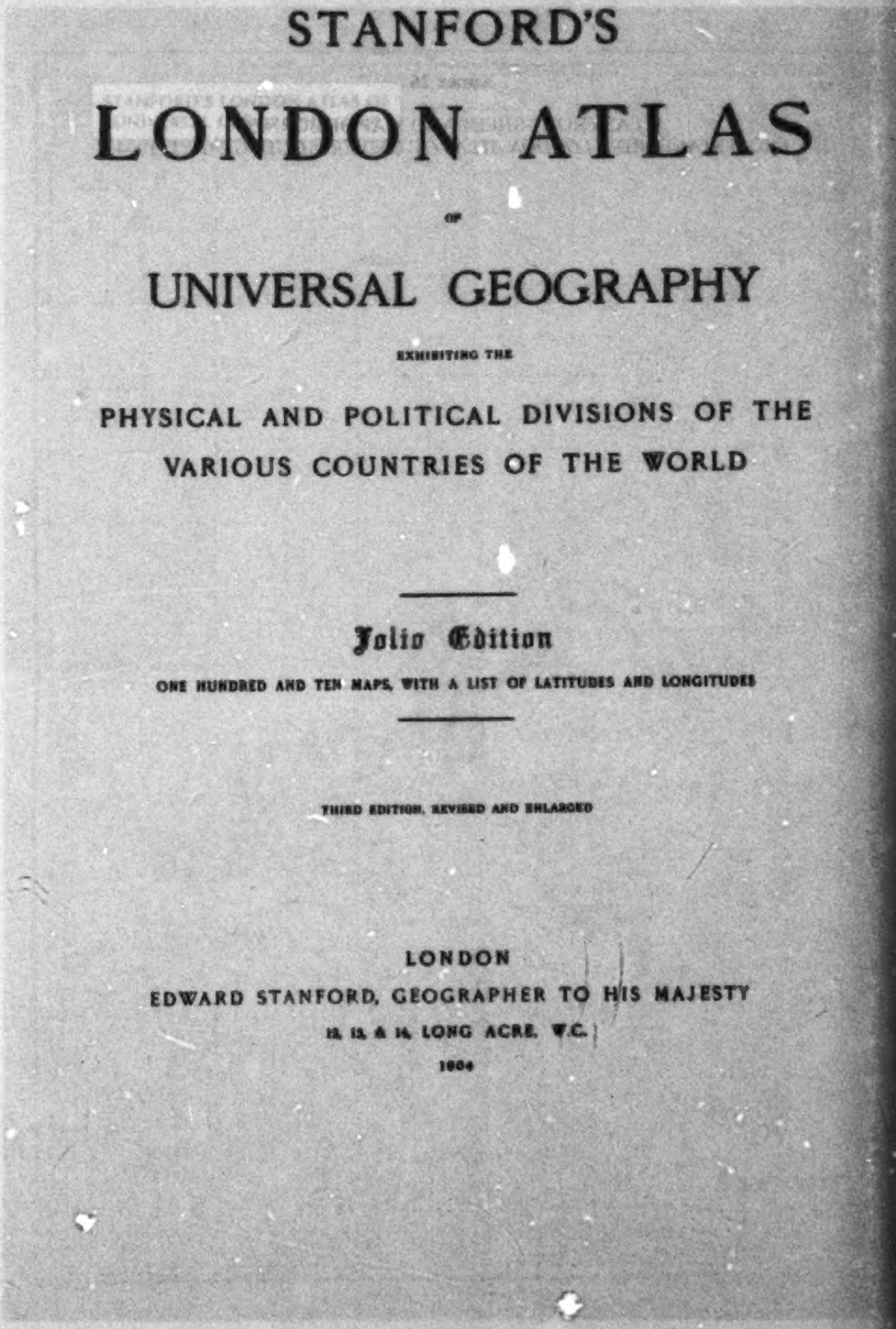
26 & 27 COCKSPUR STREET, CHARING CROSS, S.W.
[illegible]

STANFORD'S LONDON ATLAS OF UNIVERSAL GEOGRAPHY, 1894

Annex 26

ATLAS FRONT-SHEET AND MAP OF BORNEO FROM STANFORD'S *LONDON ATLAS OF UNIVERSAL GEOGRAPHY*, 1904



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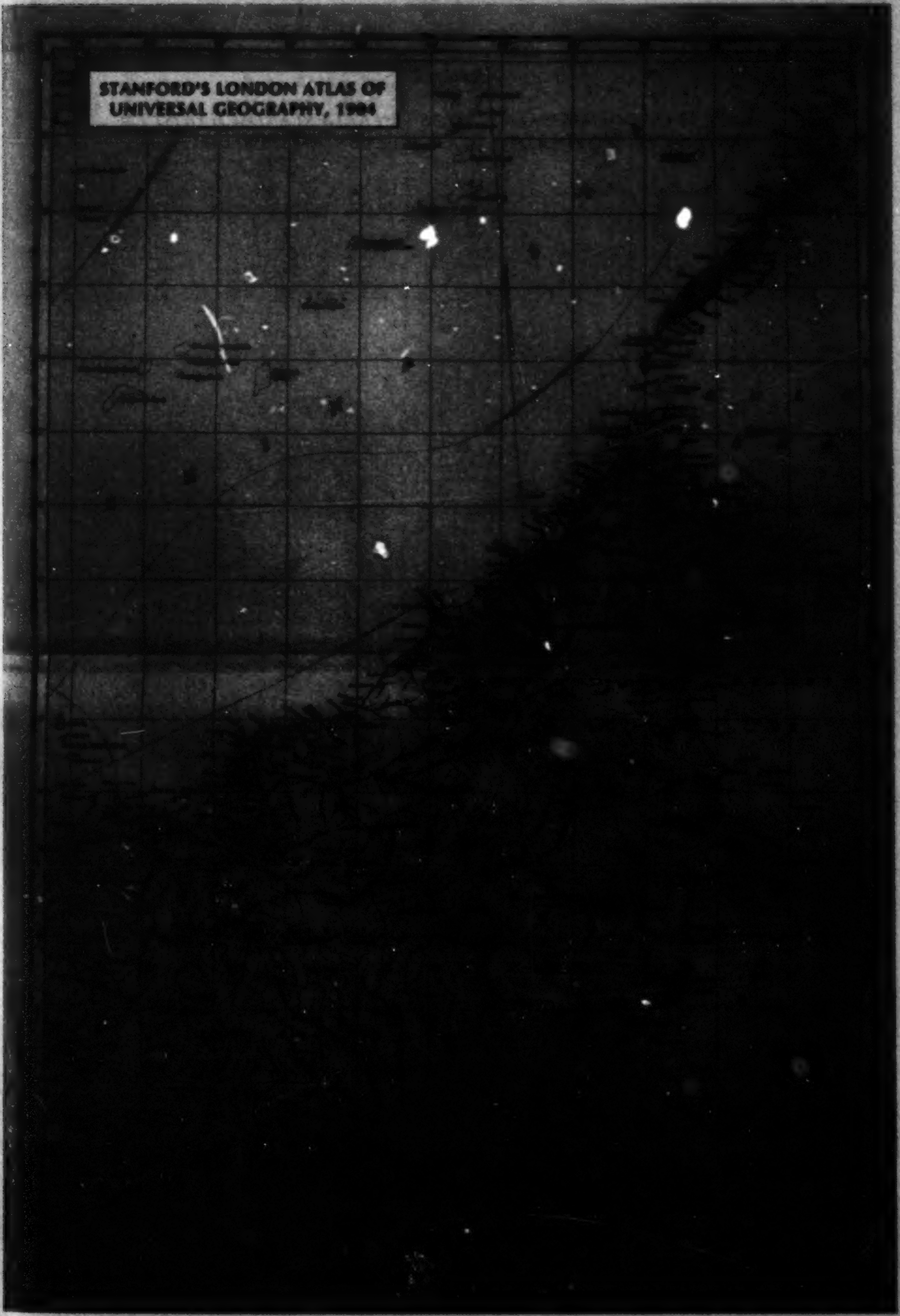
1904



STANFORD'S LONDON ATLAS OF UNIVERSAL GEOGRAPHY, 1904

Annex 27

PLATE 19 OF *DORNSEIFFEN'S ATLAS VAN NEDERLANDSCH OOST EN WEST INDIE*, SEYFFARDT'S BOOKSELLERS, AMSTERDAM, 1894

BORNEO.

BORNEO.
AMSTERDAM.
SEYFFARDT'S BOEKHANDEL.

[illegible]

Annex 28

MIJNRECHTELIJKE KAART ADMINISTRATIE TARAKAN, 1 APRIL 1939, WITH TRANSLATION OF TITLE AND LEGEND

[illegible]

TARAKAN

[illegible] 1 APRIL 1939

[illegible]

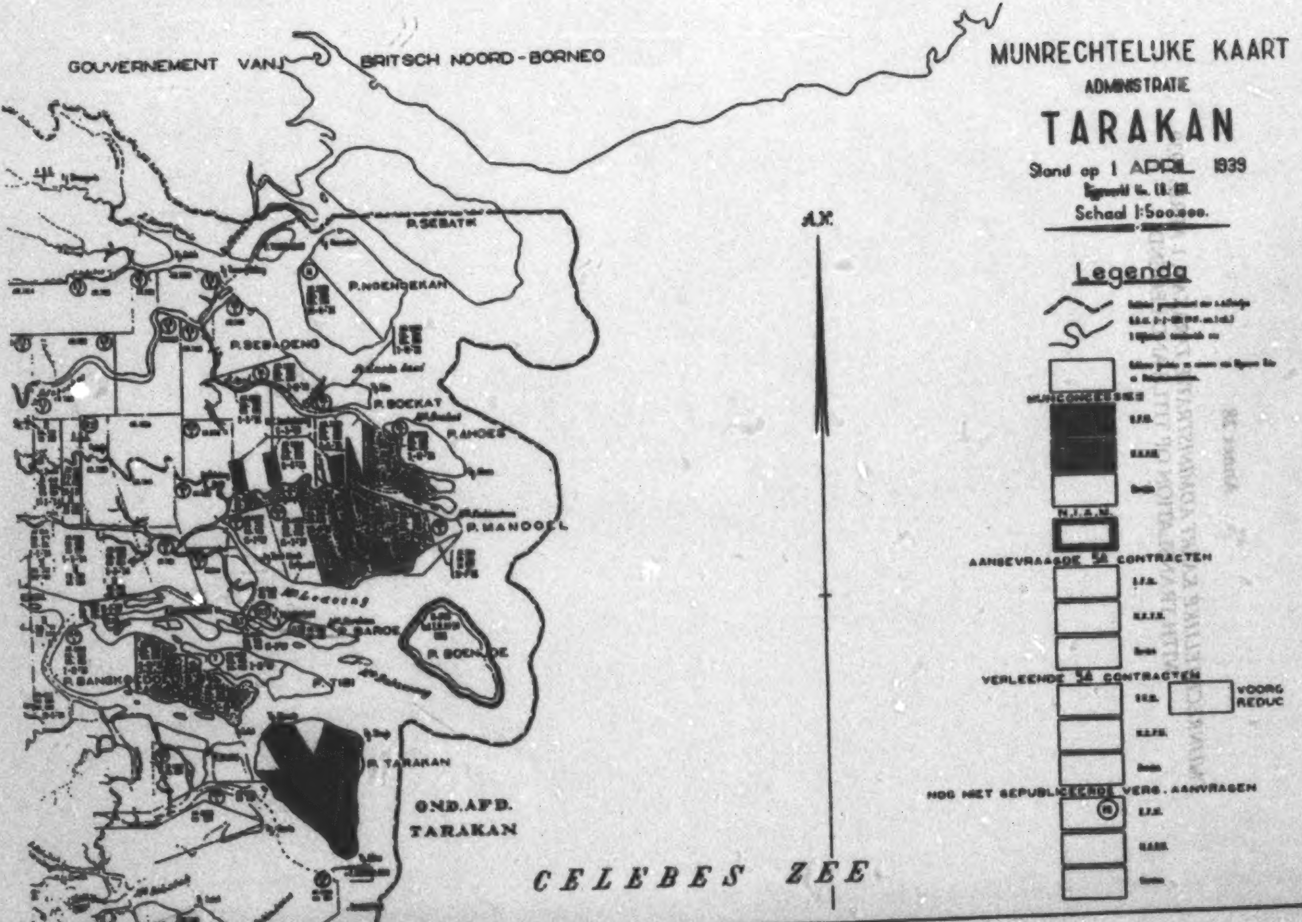
Scale 1:500 000

Legenda

(Thick broken line) areas reserved for b. minerals G.B. dd 2-2-1921 No. 1?, Art. 3 sub.1

(thin line) 3 mile coastal territorial sea

[the rest of the symbols denote various categories of concession areas]


MUNRECHTELIJKE KAART
ADMINISTRATIE
TARAKAN
Stand op 1 APRIL 1939
Schaal 1:500.000.
Legenda
MIJNCONCESSIES
N.I.A.M.
AANGEVRAAGDE 5A CONTRACTEN
VERLEENDE 5A CONTRACTEN
VOORG REDUC
NOG NIET GEPUBLICEERDE VERG. AANVRAGEN
A.N.
GOUVERNEMENT VAN BRITSCH NOORD-BORNEO
P. SEBATIK
P. NOENOEKAN
P. SEBADOENG
P. BOENJOE
P. BOEKAT
P. AHOES
P. MANDOEL
P. BAROE
P. BANGKOEDOELIS
P. TIBI
P. TARAKAN
OND.AFD. TARAKAN
CELEBES ZEE

Netherlands East Indies Mining Legislation Map (1939)

Translation of title and legenda

MINING LEGISLATION MAP
ADMINISTRATION
TARAKAN
Situation as at 1 APRIL 1939
Updated incl. EB 821
Scale 1:500.000

Legenda

(Thick broken line)	areas reserved for b. minerals G.B. dd. 2-2-1921 No. 1^{e}, Art. 3 sub.I
(thin line)	3 mile stretch territorial sea

[the rest of the symbols identify various categories of concession areas]

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